No. 97-29-ATX Title: Texas, Appellant
v.
United States, et al.

Docketed: July 2, 1997 Court: United States District Court for the District of Columbia

Entry	Date	Proceedings and Orders
	Jun 23 1997	Statement as to jurisdiction filed. (Response due September 2, 1997)
	Jun 23 1997	2 volumes of appendices to jurisdictional statement filed.
	Jul 21 1997	Order extending time to file response to jurisdictional statement until September 2, 1997.
	Aug 29 1997	Motion of appellee United States to affirm filed.
	Sep 10 1997	DISTRIBUTED. September 29, 1997
	Sep 29 1997	PROBABLE JURISDICTION NOTED. The brief of appellant is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, November 13, 1997. The brief of appellees are to be filed with the Clerk and served uopn opposing counsel on or before 3 p.m., Monday, December 15, 1997. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, January 5, 1998. Rule 29.2 does not apply. SET FOR ARGUMENT January 14, 1998. **********
	Nov 12 1997	Joint appendix filed.
	Nov 12 1997	Brief of appellant Texas filed.
	Nov 13 1997	Brief amici curiae of Washington Legal Foundation, et al. filed.
	Dec 1 1997	Record filed.
	Dec 4 1997	CIRCULATED.
	Dec 15 1997	Brief of appellee United States filed.
	Dec 15 1997	Brief amici curiae of American Civil Liberties Union, et al. filed.
	Jan 5 1998	Reply brief of appellant Texas filed.
	Jan 9 1998	Letter from the Solicitor General received and distributed.
	Jan 9 1998	LODGING consisting of a copy of correspondence between Texas Commissioner of Education and the Asst. Atty. General for Civil Rights dated March 8, 1996, May 10, 1996 and June 6, 1996 submitted by the Solicitor General and distributed.
	Jan 9 1998	Letter from Counsel for the petitioner received and distributed.
	Jan 14 1998	ARGUED.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

STATE OF TEXAS, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT FOR STATE APPELLANT

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June 1997

QUESTIONS PRESENTED

In 1995, the State of Texas submitted changes to its Education Code to the Department of Justice (the "DOJ") for preclearance under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Although the state believed that the sanctions provisions of the Education Code, which provided the Commissioner of Education with the ability to hold deficient school districts accountable, are not changes affecting voting, DOJ disagreed, and precleared Texas Education Code § 39.131(a)(7) and (a)(8) as enabling legislation. Because Texas disagreed with the DOJ's over-expansive interpretation of the scope of § 5, Texas later filed a declaratory judgment suit in federal district court seeking a determination that § 39.131 (a)(7) and 39.131(a)(8) were not subject to § 5 preclearance, because they did not constitute a change affecting voting. In the alternative, Texas sought a declaratory judgment that the preclearance provisions of § 5 do not apply to actions taken pursuant to the federal Improving America's School Act, 20 U.S.C. § 6301 *et seq.*, as modified under the waiver authority of the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891(e) ("Ed-Flex"). The district court dismissed Texas' suit on the grounds that Texas' claims were not ripe. The questions presented are:

1. Does a three-judge panel of a district court have jurisdiction over a State's claim, under 42 U.S.C. § 1973c, that an amendment to a state statute is not a change covered by § 5 of the Voting Rights Act, and need not be precleared?

2. Is a state's claim that an amendment to a statute is not subject to the preclearance requirements of § 5 of the Voting Rights Act ripe, when the United States Attorney General has precleared the statute as "enabling" legislation, but the State has taken no action under the "enabling" legislation?

PARTIES TO THE PROCEEDING

Plaintiff

The State of Texas

Defendant

The United States of America

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JURISDICTIONAL STATEMENT

The State of Texas appeals from the order of the United States District Court for the District of Columbia, dismissing Texas' claims as not ripe for adjudication.

Opinion Below

The unreported opinion of the three-judge district court is set out in the Appendix to the Jurisdictional Statement ("J.S. App.") at 1a-10a. The court's order is at J.S. App. 11a-12a. The amended opinion of the three-judge district court, which is identical to the original opinion, but contains the signatures of all three participating judges, is set out at J.S. App. 13a-23a. The court's amended order is at 24a-25a.

Jurisdiction

The judgment of the United States District Court for the District of Columbia was entered on March 5, 1997. An

amended judgment, signed by all three judges, was filed on March 17, 1997. The State filed a notice of appeal to this Court on April 23, 1997, J.S. App. 26a-27a, and filed a supplemental notice of appeal on May 12, 1997. J.S. App. 28a-29a. This Court has jurisdiction under 42 U.S.C. § 1973c and 28 U.S.C. § 2101(b).

Constitutional and Statutory Provisions Involved

The relevant federal statutory provisions are: the Voting Rights Act, 42 U.S.C. § 1973c; the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891 (e) ("Ed-Flex"); Goals 2000: Educate America Act, 20 U.S.C. § 5801 *et seq.;* and the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 *et seq.*

The relevant state statutory provisions are Texas Education Code, §§ 39.131(a) and (e). The relevant state and federal statutes are set out at J.S. App. 49a-92a.

Statement of the Case

The State of Texas is a jurisdiction covered by section 5 of the Voting Rights Act ("§ 5"). In this case, Texas sought a declaratory judgment that a change in two of the sanctions provisions contained in its education legislation is not a change affecting voting, and is not subject to the preclearance requirements of § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Alternatively, Texas sought a declaratory judgment that the preclearance provisions of § 5 do not apply to provisions of state law that conform with the federal Improving America's School Act, 20 U.S.C. § 6301 *et seq.*, as modified under the waiver authority of the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891 (e) ("Ed-Flex"). Rather than address the merits of the claim, the three judge panel held that Texas' claim was not ripe where the Attorney General had precleared the legislation as "enabling" legislation, and the State

had taken no action requiring preclearance pursuant to that enabling legislation.

A. Texas' Educational Accountability System

Texas, like all states, has a substantial interest in the education of its children. Texas has made it "the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." TEX. CONST. art. VII, § 1. Article VII, § 3 of the Texas Constitution provides in part that "the Legislature may also provide for the formation of school district[s] by general laws." Local school districts are governed by an elected board of trustees. TEX. EDUC. CODE § 11.059. In Texas, therefore, both the state and the local school districts are responsible for the public schools.

In 1995, the Texas Legislature enacted Chapter 39 of the Texas Education Code as part of Texas Senate Bill 1 ("S.B. 1"). Chapter 39 is an accountability system that holds local school districts responsible for academic performance levels and for compliance with state laws and effective governance procedures. Section 39.131 authorizes the Commissioner of Education ("Commissioner") to impose sanctions on a school district if it fails to satisfy the accreditation criteria specified in section 39.072. These sanctions allow the State to ensure that school districts adequately perform their duties in educating the State's children.

Section 39.131(a) provides ten sanctions the Commissioner may impose on a school district when necessary. The sanctions increase in severity. Two of the possible sanctions contained in § 39.131(a) form the core of this case. Section 39.131(a)(7) allows the Commissioner to appoint a master to oversee a school district's operations. Section 39.131(a)(8) authorizes the Commissioner to appoint a management team to direct the operations of a school district in areas of unacceptable performance or require a school

district to obtain certain services under contract with another person. The appointment of a master or management team for a short period of time as provided by § 39.131(a)(7) and (8) gives the Commissioner the necessary tools with which to deal with serious problems that threaten the educational process in a district.

B. Texas law makes clear that the authority of a master or management team is limited and the placement of a master or management team is temporary

Texas law limits the authority of the master or management team. A master or management team may: (1) direct an action to be taken by the principal of a campus, the district superintendent, or the district's board of trustees; and (2) approve or disapprove any action of the campus principal, the district superintendent, or the district's board of trustees. TEX. EDUC. CODE § 39.131(e)(1), (2). State law, however, specifically prohibits a master or management team from taking any action concerning a district election, including ordering or canceling an election or altering the date of, or the polling places for, an election; changing the number, or method, of selecting the board of trustees; setting a tax rate for the district; and adopting a budget for the district that provides for spending a different amount, exclusive of required debt service, from that previously adopted by the board of trustees. TEX. EDUC. CODE § 39.131(e)(3)-(6).[1]

The elected board of trustees is not displaced during the time the master or management team is in place. School boards

[1] The Texas Legislature imposed these prohibitions to ensure specifically that the sanctions in § 39.131(a)(7) and (8), providing for the temporary placement of a master or management team, would not implicate the Voting Rights Act. *See* letter from Antonio O. Garza, Texas Secretary of State, to DOJ (June 12, 1995), J.S. App. 32a-33a.

continue to have all the authority with which they are vested by Chapter 11 of the Education Code, subject to oversight by the master or management teams as needed to ensure that the deficiencies which made their appointment necessary are cured. The local school board continues to meet and make decisions. Moreover, the placement of a master or management team is temporary. Under § 39.131(e), the Commissioner must evaluate the continued need for the master or management team every 90 days. Unless that evaluation indicates that continued appointment is necessary for effective governance of the district or delivery of instructional services, the master or management team must be removed. *Id.* Finally, a party that disagrees with the Commissioner's actions, including a change in a district's accreditation status or the imposition of sanctions on a district, has a right to appeal his action to the district court of Travis County, Texas. TEX. EDUC. CODE § 7.057(d). The temporary nature of the placement, and the limitations on the authority of the master or management team, ensure that no de facto replacement of the elected board takes place.

C. DOJ preclears § 39.131(a)(7) and 39.131(a)(8) as enabling legislation

On June 12, 1995, Texas submitted S.B.1 to the United States Department of Justice ("DOJ") for administrative preclearance under section 5 of the Voting Rights Act. In doing so, Texas specifically noted that it did not believe that the sanctions provisions of § 39.131(a)(1)-(10) needed to be precleared under § 5, because they did not constitute voting-related changes. *See* letter from Antonio O. Garza, Texas Secretary of State, to DOJ (June 12, 1995), J.S. App. 31a-34a; letter from Antonio O. Garza, Texas Secretary of State, to DOJ (Oct. 9, 1995), J.S. App. 93a-102a.

The Attorney General agreed with Texas that most of the sanctions permitted under Chapter 39 are not voting changes subject to preclearance under § 5 of the Voting Rights

Act. The Attorney General, however, determined that placing a master or management team could be a change affecting voting and precleared those sanctions only as enabling legislation. The Attorney General concluded that Texas must obtain preclearance in each instance that it places a master or a management team to oversee the operations of a school district pursuant to § 39.131(a)(7) and (8), "because S.B. 1 still potentially allows for the 'take-over' of a school board such that the board cannot perform the functions that are its 'reason for being.'" *See* Letter from DOJ to Antonio O. Garza, Texas Secretary of State (December 11, 1995), J.S. App. 37a.

D. Texas is an Ed-Flex Partnership State

In January 1996, Texas was selected as one of seven Ed-Flex Partnership states, pursuant to the Educational Flexibility Partnership Demonstration Act ("Ed-Flex"), 20 U.S.C. § 5891 *et seq*. *See* Letter from Richard W. Riley, Secretary, United States Department of Education, to Michael A. Moses, Commissioner of Education, with attachments (Jan. 26, 1996), J.S. App. 39a-48a. Ed-Flex provides that the Secretary of Education may authorize State educational agencies in eligible States to waive federal statutory or regulatory requirements applicable to certain federal programs. 20 U.S.C. § 5891(e)(2), 20 U.S.C. § 5891 (e)(4)(B)(ii). One of the programs whose statutory requirements can be waived is Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 *et seq.*, which includes corrective actions that a State must take against a school district that fails to make adequate progress towards meeting the State's student performance standards. 20 U.S.C. § 6317 (d)(6)(A).

Because Texas is designated as an Ed-Flex partner, it may waive federal education regulations and statutory requirements, and replace them with its own regulations. 20 U.S.C. § 5891(e)(4)(B)(ii). As an Ed-Flex Partnership State, Texas substituted its accountability provisions, including the

sanctions listed in § 39.131(a), for the provisions of federal law. 20 U.S.C. § 5891(b)(1). In other words, § 39.131(a)(7) and (a)(8) are sanctioned by Congress' federal education laws.

E. The filing of the lawsuit in the court below

On June 7, 1996, Texas filed its complaint under the Voting Rights Act, 42 U.S.C. § 1973c, seeking a declaratory judgment that the temporary placement of a master or a management team under § 39.131(a)(7) and (8) of the Texas Education Code is not a change affecting voting, and, therefore, must not be precleared. In the alternative, Texas sought a declaratory judgment that the preclearance provisions of § 5 of the Voting Rights Act do not apply to actions taken pursuant to the federal Improving America's Schools Act, 20 U.S.C. § 6301 *et seq.*, as modified under the waiver authority of the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891(e) ("Ed-Flex").

Texas requested a three judge panel pursuant to 28 U.S.C. § 2284 and 42 U.S.C. § 1973c. The district court accepted jurisdiction on July 15, 1996, and appointed a three-judge panel on July 22, 1996. Texas then moved for summary judgment. The United States filed a motion to dismiss. After briefing by the parties, the three-judge panel granted the United States' motion to dismiss on March 5, 1997, on the grounds that the case was not ripe for judicial review. J.S. App. 10a. The court filed an amended order on March 17, 1997, signed by all three judges.[2]

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[2] Except for the signatures of all three judges, the amended order is identical to the original order, and the amended memorandum opinion is identical to the original memorandum opinion. Cites to the Appendix are to the amended memorandum opinion.

F. The lower court's decision

The district court's opinion is contradictory. The district court correctly recognized that "Texas is not seeking preclearance of its legislation," J.S. App. 16a, but "[r]ather, ... seeks a blanket determination that any action pursuant to the Commissioner's new authority under Chapter 39 would not be a change covered by section 5." J.S. App. 16a-17a. The court noted, however, "that Texas has presented a claim that does not fit neatly into the statutory framework of section 5," J.S. App. 16a, and opined that "[t]he statutory basis for jurisdiction over such an action is unclear." J.S. App. 17a. The district court, however, did not decide whether the court had jurisdiction over Texas' claim that the statute need not be precleared under § 5, deciding instead that the case was not ripe for judicial review. J.S. App. 17a.

The district court concluded that Texas' claims met neither the constitutional nor the prudential components of the ripeness doctrine. J.S. App. 17a. In holding that Texas' claim was not ripe, the court rejected Texas' argument that the case presented a legal issue regarding the interpretation of a state statute. Instead, the court held that factual development of the "actual contours" of each appointment order was needed to determine whether an elected board was displaced or its powers diminished. J.S. App. 19a. Indeed, the district court went further, ruling that Texas' claim was not ripe because the issue of whether the elected board was displaced could not be decided without "examining the full factual context in which [the Commissioner] is acting before deciding whether an action can be precleared. Put simply, that discretion makes the statute one that cannot be analyzed uniformly in Section 5 terms." J.S. App. 19a.

The court also held that Texas would not suffer undue hardship if judicial review were withheld. J.S. App. 21a. Seeking preclearance each time the Commissioner places a master or management team is not "so unwieldy as to deny

Texas a meaningful opportunity to expeditiously implement its statutory scheme." J.S. App. 21a. In so holding, the district court ignored the fact that the delay caused by the preclearance process would adversely affect the ability of the Commissioner to rectify the factors causing the deficiency in the school district. Moreover, the district court did not address the damage to federalism that results from requiring a state to seek preclearance when such is not required. To the contrary-the district court simply assumed that voting rights were involved:

> Congress has made the decision that the protection of voting rights outweighs any other state concerns. It is Congress which has struck the balance in favor of preclearance to protect voting interests over school district changes to improve the education process.

J.S. App. 21a.

However, in concluding that Congress "had struck the balance in favor of preclearance to protect voting interests over school district changes to improve the education process", the court did not address Texas' claim that actions taken pursuant to the Improving America's Schools Act, 20 U.S.C. § 6301 *et seq.*, as modified under the waiver authority of the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891(e) ("Ed-Flex"), do not require preclearance.

The Questions Presented Are Substantial

1. Does a three-judge panel of a district court have jurisdiction over a State's claim, under 42 U.S.C. § 1973c, that an amendment to a state statute is not a change covered by § 5 of the Voting Rights Act, and need not be precleared?

This case requires the Court to consider whether Texas has raised a cognizable claim under 42 U.S.C. § 1973c. Texas seeks a determination that § 39.131(a)(7) and (8) are not changes affecting voting, are not subject to the Voting Rights Act, and need not be precleared. The district court did not address whether § 5 allows a state to seek a declaratory judgment that a statute is not covered by § 5. J.S. App. 17a. It noted that

> The statutory basis for jurisdiction over such an action is unclear. Although this Court has addressed issues of section 5 coverage in the past, those claims have arisen in the context of an action for judicial preclearance. [cites omitted] Even if a statutory basis for jurisdiction exists, however, it is unclear whether such an action would involve a "case or controversy" sufficient to satisfy the requirement of Article III of the Constitution.

J.S. App. 17a. This result is incompatible with 42 U.S.C. § 1973c.

The Voting Rights Act "implemented Congress' firm intention to rid the country of racial discrimination in *voting*." *Allen v. State Bd. of Elections*, 393 U.S. 544, 548 (1969) (emphasis added). States covered by the Act are required to seek preclearance of legislation that is a "voting qualification or prerequisite to voting, or standard, practice, or procedure with

respect to voting different from that in force or effect on November 1, 1964." 42 U.S.C. § 1973c. Because the Voting Rights Act imposes a heavy burden on state sovereignty, however, it is equally clear that states are not required to seek preclearance if the legislation at issue does not affect voting. "Section 5 of the Voting Rights Act is unambiguous with respect to the question whether it covers changes other than changes in rules governing voting: It does not." *Presley v. Etowah Co. Comm.*, 502 U.S. 491, 509 (1992).

As the district court noted, actions under § 5 generally have fallen into three main categories. First, a state may bring an action for judicial preclearance. J.S. App. 16a. In that situation, the state shows that the legislation "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race." 42 U.S.C. § 1973c. Second, an individual may bring a private enforcement action, asking for a determination that a proposed change in legislation must be precleared because it is a change affecting voting. J.S. App. 16a. Finally, the Attorney General may bring an enforcement action. J.S. App. 16a; *Allen*, 393 U.S. 544, 561-63. This case asks the Court to consider whether 42 U.S.C. § 1973 permits a state to obtain a judicial determination that an amendment to a state statute is not a change affecting voting, and is not subject to § 5 of the Voting Rights Act. The fundamental tension between the Voting Rights Act and concepts of state sovereignty favor such a cause of action.

Further, the holding in *Allen v. State Board of Education* supports such a holding. In *Allen*, this Court recognized that the importance of federalism issues requires a three-judge panel to determine whether a state statute is covered under § 5 of the Voting Rights Act:

> We conclude that in light of the extraordinary nature of the [Voting Rights] Act in general, and the unique approval requirements of § 5,

> Congress intended that disputes involving the coverage of § 5 be determined by a district court of three judges.

Allen 393 U.S. at 562-63.

As in *Allen*, the issue before the Court is whether a state enactment is subject to § 5. There is no reason 42 U.S.C. § 1973c should be interpreted to allow both a private individual and the Attorney General to obtain a determination whether a state statute is a change affecting voting, and to deny a state an opportunity to obtain that same judicial determination. In fact, the reasoning of the *Allen* court supports Texas' right to such a determination:

> Notwithstanding the problems for judicial administration, Congress has determined that three-judge courts are desirable in a number of circumstances involving confrontations between state and federal power or in circumstances involving a potential for substantial interference with government administration. The Voting Rights Act of 1965 is an example. Federal supervision over the enforcement of state legislation always poses difficult problems for our federal system. The problems are especially difficult when the enforcement of state enactments may be enjoined and state election procedures suspended because the State has failed to comply with a federal approval procedure.
>
> In drafting § 5, Congress apparently concluded that if the governing authorities of a State differ with the Attorney General of the United States concerning the purpose or effect of a change in voting procedures, it is inappropriate to have

> that difference resolved by a single district judge. The clash between federal and state power and the potential disruption to state government are apparent. *There is no less a clash and potential for dispute when the disagreement concerns whether a state enactment is subject to § 5.* The result of both suits can be an injunction prohibiting the State from enforcing its election laws. Although a suit brought by the individual citizen may not involve the same federal-state confrontation, the potential for disruption of state election procedures remains.

Allen, at 562-63 (emphasis added). Here, the suit brought by Texas involves the precise federal-state confrontation addressed in *Allen*.

Further, judicial resolution is needed because, in failing to rule on Texas' claim, the district court has allowed the DOJ's determination that a change in a statute is a change affecting voting to go unchallenged. The DOJ's determination that preclearance is necessary is based on its assumption that, under certain circumstances, the placement of a master or management team could result in "the 'takeover' of a school board such that the board cannot perform the function that are its 'reason for being.'" J.S. App. 37a. As discussed above, however, § 39.131(e) of the Texas Education Code contains provisions that specifically preclude either an actual or de facto replacement of the elected board from taking place. The elected board of trustees remains active during the time a master or management team is in effect. The elected board continues its functions, subject to overview by the master or management team. Moreover, the authority of the master or management team is limited by statute, and is not dependent on the Commissioner's discretion. DOJ simply failed to interpret the coverage of section 5 correctly.

This court should not allow DOJ's erroneous determination as to the scope of § 5 of the Voting Rights Act to stand. Moreover, this Court's holding in *Morris v. Gressette*, 432 U.S. 491(1977) does not preclude judicial resolution of this issue. In *Gressette*, this Court held that a district court did not have jurisdiction under the Administrative Procedure Act to review the Attorney General's failure to object to a state's reapportionment plan.

This case differs from *Gressette* in several important respects. First, unlike *Gressette*, this case does not involve a request for preclearance under § 5. The issue here is more basic: that is, whether a state statute is subject to § 5 of the Voting Rights Act, and needs to be precleared. Second, the severe nature of the § 5 remedy supports judicial resolution. Without a judicial determination that the statute is not subject to the Voting Rights Act, Texas will be obliged to submit any temporary placements of a master or management for preclearance. Texas would be denied its right to administrate the education of Texas' children, a matter firmly within the ambit of state regulation.

This case is similar to *Presley v. Etowah County*, 502 U.S. 491 (1992), in which this Court refused to defer to the DOJ's interpretation of the scope of § 5. In *Presley*, the Court considered whether the permanent delegation of authority from an elected to a appointed official constituted a change with respect to voting. The DOJ argued that it did, and urged the Court to defer to the DOJ's administrative construction of § 5. This Court refused to do so. Noting that "[d]eference does not mean acquiescence," *Id.* at 508, this Court emphasized that Congress' intent as to the scope of § 5 is unambiguous: § 5 applies only to changes affecting voting. *Id.* at 509.

In holding that the change in authority of the elected officials in *Presley* did not constitute a change affecting voting, the Court noted that there had been no change in elective office - the citizens still voted for the elected official. Moreover, some changes in duties of elected officials are to be expected: "[i]t is

a routine part of governmental administration for appointive positions to be created or eliminated and for their powers to be altered." *Id.* at 507.

In this case, as in *Presley*, the voters still elect members of the school districts' board of trustees. The board remains in existence, and continues its duties, subject to the limited oversight of the master or management team. However, unlike the situation in *Presley*, where authority was permanently delegated from the elected official to the appointed official, the delegation of authority to a master or management team is limited in authority and limited in time; it lasts only until the deficiencies in the school district have been corrected.

Finally, action taken to protect the education of Texas children is precisely the type of "routine matter[] of state governance" that should not be, and was not contemplated to be, subject to federal supervision:

> By requiring preclearance of changes with respect to voting, Congress did not mean to subject such routine matters of governance to federal supervision. Were the rule otherwise, neither state nor local governments could exercise power in a responsible manner within a federal system.

Presley v. Etowah County, 502 U.S. at 507.

This Court has expressed concern even more recently about DOJ's expansive interpretation of the Voting Rights Act. In *Miller v. Johnson*, 115 S. Ct. 2475 (1995), the Court refused to accord deference to DOJ's interpretation of the scope of § 5 of the Voting Rights Act, noting that DOJ's "maximization policy requiring States to create majority-minority districts wherever possible," was far removed from "the purpose of § 5." *Id.* at 2493.

In a case decided this term, Justice Thomas emphasized the importance of independent judicial examination of cases under § 5:

> Section 5 [of the Voting Rights Act] sets up alternative routes for preclearance, and the primary route specified is through the District Court for the District of Columbia, not through the Attorney General's office. See 42 U.S.C. § 1973c (generally requiring District Court preclearance, with a provision that covered jurisdictions may obtain preclearance by the Attorney General in lieu of District Court preclearance, but providing no authority for the Attorney General to preclude judicial preclearance.) Requiring the District Court to defer to adverse preclearance decisions by the Attorney General based upon the very preclearance standards she articulates would essentially render the independence of the District Court preclearance route a nullity.

Reno v. Bossier Parish School Board, 117 S.Ct. 1491, 1504 (1997) (Thomas, J., concurring). While *Bossier Parish* involved a question of whether a redistricting plan should be precleared under § 5, there is an even greater need for independent judicial determination of whether a state enactment is subject to § 5 preclearance at all. A state should not be required to seek preclearance of a specific placement of a monitor or management team before it can obtain a judicial determination that the statute in question is not a change affecting voting. Such a holding would hamper state sovereignty, and violate fundamental tenets of federalism. As in *Miller*, the federalism costs exacted by § 5 preclearance can not be justified under the circumstances of this case. *Miller*, 115 S.Ct. at 2493.

Moreover, the language of the Voting Rights Act, including § 5, makes clear that Congress intended that it apply only to affected states and subdivisions.[3] It does not apply to acts passed by the federal government.

In 1994, Congress passed the Improving America's Schools Act, 20 U.S.C. § 6301 *et seq.* This Act revised, strengthened, and improved the Elementary and Secondary Education Act of 1965, and authorized additional funds to help disadvantaged children meet enhanced educational standards. 20 U.S.C. §§ 6301(d), 6302. To be eligible for these funds, States are required to design both challenging performance standards and assessment systems to measure children's achievement under these standards. 20 U.S.C. § 6311 (b).

States receiving funds under this Act must measure students' performance. To assure progress towards educational goals, the Act specifically requires a State to identify any local educational agency[4] that fails to make adequate progress

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[3] Section 1973 of the Voting Rights Act provides in part that:

> [n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be *imposed or applied by any State or political subdivision* in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . .

42 U.S.C. § 1973 (emphasis added).

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, requires that an affected state or subdivision seek preclearance of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting."

[4] 20 U.S.C. § 5802(a)(6) provides that the definitions of the terms "local educational agency" and "state educational agency" are found at 20 U.S.C. §§8801(18)(A) and 8801(28), respectively. As defined in § 5802(a)(6), a Texas school district is a "local educational agency," and the

towards meeting the State's student performance standards for two years. 20 U.S.C. § 6317 (d)(3)(A)(i). After a local educational agency has been so identified, the State may take corrective action against that local educational agency. 20 U.S.C. § 6317(d)(6)(A). The State *must* take such action against an identified local educational agency that fails to make adequate progress after four years. *Id.*

Corrective actions range in severity, and may include (1) the withholding of funds; (2) the reconstitution of school district personnel; (3) removal of particular schools from the jurisdiction of the local educational agency and establishment of alternative arrangements for public governance and supervision of such schools; (4) implementation of the opportunity-to-learn standards or strategies developed by such State under the Goals 2000: Educate America Act (20 U.S. C. § 5801 *et seq.)*; (5) *appointment by the State educational agency of a receiver or trustee to administer the affairs of the local educational agency in place of the superintendent and school board;* (6) the abolition or restructuring of the local educational agency; (7) the authorizing of students to transfer from a school operated by one local educational agency to a school operated by another local educational agency; and (8) a joint plan between the State and the local educational agency that addresses specific elements of student performance problems and that specifies State and local responsibilities under the plan. 20 U.S.C. § 6317 (d)(6)(B)(i)(I)-(VIII) (emphasis added).

Federal law, therefore, requires States to take corrective action against local educational districts when necessary to assure progress towards educational goals. The corrective actions authorized under federal law are similar to the sanctions authorized by § 39.131(a) of the Texas Education Code. In fact, federal law allows for the *replacement* of a school board,

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Texas Education Agency, headed by the Commissioner of Education, is the "state educational agency" for Texas.

as well as abolition of a school district, both of which are more draconian than the modest sanctions at issue here. 20 U.S.C. § 6317(d)(6)(B)(i)(V), (VI). If a school district fails to make adequate progress towards meeting the State's educational performance standards, both the Texas and federal statutes provide for the appointment of a receiver or trustee to administer the affairs of a school district.

Further, Congress has recently passed legislation which enables states to substitute their own assessment and accountability provisions for those of the federal statutes. In 1994, Congress passed the Educational Flexibility Partnership Demonstration Act ("Ed-Flex") as part of the Goals 2000: Educating America Act ("Goals 2000"), 20 U.S.C. § 5801 *et seq*. The Goals 2000 Act is intended to promote educational reform leading to improved educational outcomes by, among other things, "encouraging and enabling all State educational agencies and local educational agencies to develop comprehensive improvement plans. . ." 20 U.S.C. § 5801(6)(D).

In the Goals 2000 Act, "Congress agrees and reaffirms that the responsibility for control of education is reserved to the States and local school systems and other instrumentalities of the States. . ." 20 U.S.C. § 5899(b). Moreover, the Act expressly provides that the federal government shall take no action under the Act "which would reduce, modify, or undercut State and local responsibility for control of education." *Id.*

This emphasis on state control of education is further demonstrated by the Ed-Flex portion of the Act. 20 U.S.C. § 5891. Ed-Flex provides that the Secretary of Education may authorize State educational agencies in eligible States to waive federal statutory or regulatory requirements applicable to certain federal programs. 20 U.S.C. § 5891(e)(2). One of the programs whose statutory requirements can be waived is Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 *et seq.*, which includes the corrective actions discussed above. 20 U.S.C. § 5891(b)(1).

Texas has been selected as one of seven Ed-Flex Partnership states, allowing it to waive certain provisions of federal law, including the corrective actions listed in Title I of the Elementary and Secondary Education Act of 1965, found at 20 U.S.C. § 6317(d)(6)(B)(i)(I)-(VIII). *See* Letter from Richard W. Riley, Secretary, United States Department of Education, to Michael A. Moses, Commissioner of Education, with attachments (Jan. 26, 1996), J.S. App. 39a-48a.

Texas has used the Ed-Flex waiver process to conform the federal grant of authority for corrective actions to the provisions of its state authorization under Chapter 39 of the Texas Education Code. Thus, Texas has *pursuant to federal authorization* precisely the same authority it enjoys under state law.

Because a federal statute authorizes Texas to use its own accountability program, section 5 of the Voting Rights Act does not apply to § 39.131(a)(7) and (a)(8) of the Texas Education Code which conform to that federal statute. To hold otherwise would imply that a change in state law that conforms to, and is specifically permitted by, a federal statute is a change affecting voting subject to § 5 preclearance requiring Texas to show that by following federal law the legislation "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race". 42 U.S.C. § 1973c. This result is a classic "reductio ad absurdum". Yet that is the result of the district court's ruling. Such a result prevents Texas from exercising its power in a responsible manner within the federal system, and defeats the purpose of the federal education statutes. Requiring Texas, unlike states not covered by section 5 of the Voting Rights Act, to seek preclearance in this circumstance could result in the very harm to education that the federal statutes are intended to prevent. In fact, § 5, if applied in this circumstance, would punish covered jurisdictions in a manner that Congress never intended.

2. Is a state's claim that an amendment to a statute is not subject to the preclearance requirements of § 5 of the Voting Rights Act ripe, when the United States Attorney General has precleared the statute as "enabling" legislation, but the State has taken no action under the "enabling" legislation?

The district court dismissed Texas' claim on the grounds that it did not meet either the constitutional or prudential requirements of ripeness. The district court erred in that determination.

Ripeness is governed by a two-part test. First, the Court must consider the "fitness of the issue for judicial decision." Second, the court must consider "hardship to the parties of withholding court consideration." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967). Consideration of both factors indicate that this case is ripe.

A. Fitness of issue for judicial determination.

In considering whether an issue is fit for judicial decision, the court must consider whether there is a present case or controversy between the parties. There is. Texas has enacted legislation and seeks a determination that this legislation need not be precleared because it is not subject to § 5 of the Voting Rights Act. Texas asks this Court to construe a statute. Questions of statutory interpretation are independent of any factual dispute. In *Abbott Laboratories v. Gardner*, this Court held that whether the Food and Drug Commissioner had correctly interpreted a statute was fit for judicial determination because the "issue tendered is a purely legal one." 387 U.S. at 149.

Moreover, the impact of the DOJ's decision that the particular placement of a master or a management team must be precleared "is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage" because the

decision "put [the State of Texas] in a dilemna." *Abbott Laboratories v. Gardner*, 387 U.S. at 152. Either the State complies with the preclearance requirement and subjects routine matters of state government to federal supervision, or it follows its present course and risks time consuming litigation that will encumber the State's ability to address problem school districts. *Id.*

Nor must the Court wait until Texas makes a specific placement of a master or management team to determine the authority given the master or management team. As discussed above, the limitations on a master's or management team's authority are codified at TEX. EDUC. CODE § 39.131(e). No factual determinations are necessary for a court to decide whether the appointment of a master or management team exercising the limited powers authorized by the statute constitutes a change affecting voting. In short, a court can render a declaratory judgment based on its purely legal assessment that § 39.131(a)(7) and (8) are not provisions containing changes affecting voting subject to § 5 of theVoting Rights Act.

Further, as explained more fully above, Texas' claims under the Improving America's Schools Act, 20 U.S.C. § 6301, *et seq.*, as modified by the Educational Flexibility Partnership Demonstration Act ("Ed-Flex"), 20 U.S.C. § 5801 *et seq.*, are purely legal ones, and not dependent on facts. That issue is whether the Voting Rights Act applies to state action taken pursuant to a federal statute.

B. Hardship to the parties

The immediate impact on Texas satisfies the "hardship" prong of the *Abbott Laboratories* test, because "the legal issue presented is fit for judicial resolution, and ... requires an immediate and significant change in [Texas'] conduct of [its] affairs with serious penalties attached to noncompliance." 378 U.S. at 153.

Failure to consider Texas' claims now causes more hardship than "expedited" litigation in the future. Failure to rule on Texas' claims subjects Texas to unwarranted federal intrusion into state affairs. This result violates the Constitutional guarantees of federalism. Texas has enacted Chapter 39 of the Texas Education Code to fulfill its important responsibility to educate the children of the State. The sanctions provided in § 39.131(a), including the temporary placement of a master or management team with their limited powers, are intended to provide Texas with the controls necessary to meet that responsibility. Legislative changes to these controls are quintessentially "changes in the routine organization and functioning of government" that this Court described and distinguished from "changes in rules governing voting" in *Presley v. Etowah County*, 502 U.S. at 504-508. Refusing to hear Texas' claims until Texas takes action and then seeks preclearance under the enabling legislation, turns the fundamental precept of federalism on its head.

Moreover, Congress recognizes that "the responsibility for control of education is reserved to the States ..." 20 U.S.C. § 5899(b). Thus, Congress specifically permits States to substitute their state education accountability provisions for federal education accountability provisions to ensure state governance over education. It makes no sense to permit Texas to appoint a trustee under federal law without seeking preclearance, but to require Texas to seek preclearance when it does so under state law, as expressly authorized by federal statute.

CONCLUSION

DOJ's over-expansive application of § 5 of the Voting Rights Act interferes with, and disrupts Texas' system to maintain the quality of education in the State. The district court's opinion, if upheld, will have a predictable result: the

diminution of the quality of education of all Texas school children. The Court should note probable jurisdiction.

Respectfully submitted,

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June 1997

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

STATE OF TEXAS, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPENDIX TO JURISDICTIONAL STATEMENT FOR STATE APPELLANT

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June 1997

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed March 5, 1997

STATE OF TEXAS, Plaintiff,	:	
v.	:	
	:	Civil Action
UNITED STATES OF AMERICA, Defendant.	:	No. 96-1274 (JWR (USCA), AER, GK)

MEMORANDUM OPINION OF THE THREE-JUDGE COURT UNDER THE VOTING RIGHTS ACT

Before Rogers, U.S. Circuit Judge, Robinson, Senior U.S. District Judge, and Kessler, U.S. District Judge.

Opinion for the Court by Kessler, J.

APPEARANCES

FOR THE PLAINTIFF: Javier Aguilar, Office of the Attorney General of the State of Texas, Austin Texas. With him on the pleadings were Dan Morales, Jorge Vega, and Deborah A. Verbil of the Office of the Attorney General of the State of Texas, Austin, Texas.

FOR THE DEFENDANT: Robert A. Kengle, United States Department of Justice, Voting Section, Civil Rights Division, Washington, D.C. With him on the pleadings were Elizabeth Johnson and Donna M. Murphy, Voting Section, Civil Rights Division, United States Department of Justice; Deval L. Patrick, Assistant Attorney General, Washington, D.C.; and Eric H. Holder, Jr., United States Attorney, Washington, D.C.

I. INTRODUCTION

Plaintiff, the State of Texas, seeks a declaratory judgment that the preclearance provisions of section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, do not apply to §§ 39.131(a)(7) and (8) of the Texas Education Code or, alternatively, that they do not apply to actions taken pursuant to the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891(e), to conform with § 39.131 of the Texas Education Code. Three motions are pending before the Court: (1) Defendant United States' Motion to Dismiss, or in the Alternative, for Judgment on the Pleadings; (2) United States' Motion to Strike; and (3) Texas' Motion for Summary Judgment. For the reasons discussed below, we **grant** the United States' Motion to Dismiss because the issues presented are not ripe for judicial review.[1]

II. Background[2]

In 1995, the Texas Legislature enacted Chapter 39 of the Texas Education Code ("Chapter 39") as part of Texas Senate Bill 1 ("S.B. 1"). Chapter 39 created an assessment system designed to hold Texas school districts accountable for academic performance levels based on a state administered exam. Compl. ¶¶ 7, 19.

Chapter 39 authorizes the Commissioner of Education ("Commissioner") to impose sanctions on school districts under certain circumstances, including lowered or unimproved accreditation ratings or violations of federal law or regulations regarding federally-required or funded programs. Moreover,

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[1] Because of our disposition of Defendant's Motion to Dismiss, the remaining motions need not be decided.

[2] When deciding a Motion to Dismiss, the court must presume the allegations of a plaintiff's complaint to be true and construe them liberally in its favor. Shear v. National Rifle Ass'n of Am., 606 F.2d 1251, 1253 (D.C. Cir. 1979). All background information is taken from Plaintiff's Complaint ("Compl.").

the Commissioner is authorized to impose sanctions on a district if an investigation reveals a violation of the state's accountability system, required accounting and financial practices, excessive alternative placements, violation of civil rights or other federally-imposed requirements, or violation of the legally-established roles of superintendent and board of trustees. Compl. ¶¶ 7, 8.

Section 39.131(a) sets forth the sanctions that the Commissioner may impose on a school district "to the extent the Commissioner determines necessary." Of the ten possible sanctions listed in section 39.131(a), two form the core of this litigation: section 39.131(a)(7), which authorizes the Commissioner to appoint a master to oversee a district's operations, and section 39.131(a)(8), which authorizes the Commissioner to appoint a management team to direct the operations of the district in areas of unacceptable performance. Compl. ¶¶ 9-11.

The State of Texas is a jurisdiction covered by section 5 of the Voting Rights Act ("section 5") and must, therefore, obtain preclearance from this Court or from the United States Attorney General (the "Attorney General") prior to implementing changes affecting voting. Compl. ¶¶ 1, 3. After S.B. 1 was passed, Texas submitted portions of the statute to the Attorney General for preclearance. Texas submitted the sanctions provisions of § 39.131 under protest. The Attorney General determined that the sanctions provided for in § 39.131(a)(1)-(6) did not require preclearance. However, she also concluded that Texas must obtain preclearance in each instance that it appoints a master or a management team to a school district under § 39.131(a)(7) or (8). Compl. ¶ 19.

III. Analysis

The United States has moved to dismiss the Complaint on the ground that Texas' claim is not ripe for judicial review. Before addressing that argument, we note that Texas has presented a claim that does not fit neatly into the statutory framework of section 5. Section 5 prohibits covered

jurisdictions from enforcing any change that affects voting without first obtaining "preclearance" either administratively, through the Attorney General, or judicially, through the United States District Court for the District of Columbia. 42 U.S.C. § 1973c.

There are at least three types of actions that may be brought under section 5. Allen v. State Bd. of Elections, 393 U.S. 544, 561 (1969). First, a state may bring an action for judicial preclearance, seeking a declaration that the new rule was not enacted for a discriminatory purpose and will not have a discriminatory effect. Id. Second, an individual may bring a private enforcement action for declaratory judgment and injunctive relief in a local federal district court to block a jurisdiction from enforcing a change that has not been precleared. Id. at 554-57, 561. Finally, the Attorney General may bring an enforcement action. Id. at 561. The jurisdiction of a district court in an enforcement action is quite limited; the court may not make the preclearance determination for itself but must confine its inquiry to whether the enactment at issue was required to be precleared, whether it has been precleared, and what temporary remedy, if any, is appropriate. Lopez v. Monterey County, 117 S. Cit. 340, 349 (1996); United States v. Board of Supervisors, 429 U.S. 642, 645-47 (1977) (per curiam); Perkins v. Matthews, 400 U.S. 379, 383-85 (1971).

Texas' lawsuit does not fall clearly into any of these three categories. In particular, Texas is not seeking preclearance of its legislation. See Texas' Application for a three-judge court, filed June 7, 1996, at 2. Rather, it seeks a blanket determination that any action pursuant to the Commissioner's new authority under Chapter 39 would not be a change covered by section 5. The statutory basis for jurisdiction over such an action is unclear. Although this Court has addressed issues of section 5 coverage in the past, those claims have arisen in the context of an action for judicial preclearance. See State of Texas v. United States, 866 F. Supp. 20, 24-26 (D.D.C. 1994); State of Texas v. United States, 785

F. Supp. 201, 205-206 (D.D.C. 1992); County Council v. United States, 555 F. Supp. 694, 700-702 (D.D.C. 1983). Even if a statutory basis for jurisdiction exists, however, it is unclear whether such an action would involve a "case or controversy" sufficient to satisfy the requirement of Article III of the Constitution. We need not address these issues, however, because we conclude that the instant case is not ripe for judicial review.

The doctrine of ripeness has an Article III component and a prudential component. National Treasury Employees Union v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996) ("NTEU"). The Article III component is closely linked to the doctrine of standing, and "shares the constitutional requirement that an injury-in-fact be certainly impending." Id. Even where this constitutional requirement is satisfied, however, the prudential component of the doctrine requires a court to evaluate "the fitness of the issues for judicial consideration and the hardship to the parties of withholding court consideration." Abbott Labs. Inc. v. Gardner, 387 U.S. 136, 149 (1967). Although the United States refers to the constitutional component of ripeness, its motion focuses primarily on the prudential component of the doctrine. We conclude that neither aspect of the doctrine is satisfied.

A. Article III Ripeness

With regard to the Article III component of the ripeness doctrine, Texas asserts that the injuries it will sustain are "the diminution of the quality of education of all Texas school children," Texas' Response at 3, and an inability to "mov[e] promptly and efficiently to safeguard the education of its children." Id. at 7.

These are important considerations. However, these injuries are not sufficiently imminent to create a justiciable controversy. If the State of Texas seeks to appoint a management committee or master, it will have two methods for seeking a determination of the applicability of the Voting Rights Act to such appointment: preclearance by the Attorney General

or recourse to this Court. Texas' argument assumes that neither the Attorney General nor the courts will grant preclearance, or that proceedings will not be handled expeditiously. These assumptions are, simply, too speculative to sustain a claim. When a "case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all," 13A Wright et al., Federal Practice and Procedure: Jurisdiction 2d § 3532 (1984), Article III's imminence requirement is not satisfied. See Natural Resources Defense Council v. E.P.A., 589 F.2d 156, 166 (D.C. Cir. 1988) (citations and internal quotations omitted).

B. Prudential Ripeness Concerns

To determine whether a particular case meets the prudential aspect of the ripeness doctrine, the court applies the two prong test set forth in Abbott Labs., supra; City of Houston, Tex. v. Department of Housing and Urban Dev., 24 F.3d. 1421, 1430-31 (D.C. Cir. 1994); NTEU, 101 F.3d at 1431. Both prongs of the test must be satisfied before a court may hear a case and render a decision on the merits. Chamber of Commerce of the U.S. v. Reich, 57 F.3d 1099, 1100 (D.C. Cir. 1995) (per curiam).

Under the "fitness of the issues" prong of Abbott Laboratories, the first question for the court is whether this lawsuit raises purely legal questions and is therefore "presumptively suitable for judicial review." City of Houston, 24 F.3d at 1430-31 (quoting Better Gov't Ass'n v. Department of State, 780 F.2d 86, 92 (D.C. Cir. 1986)). Judicial action is not appropriate where a claim is dependent on issues of fact. Office of Communication of the United Church of Christ v. F.E.C., 826 F.2d 101, 105 (D.C. Cir. 1987). Even if the claim raises only legal issues, however, the court must also consider whether it or the parties would benefit from postponing review until the challenged issue has "sufficiently 'crystallized' by taking on a more definite form." City of Houston, 24 F.3d at 1431 (quoting Better Gov't, 780 F.2d at 92).

Under the statutory scheme contained in Section 5, when preclearance is not granted, as in this case, the political entity must seek a determination each time it seeks to act that its action does not abridge voting rights in a discriminatory manner.

Texas argues that its claim presents a purely legal issue of statutory interpretation, namely, whether § 39.131 constitutes a change affecting voting requiring preclearance under section 5 of the Voting Rights Act. In effect, it asks for a blanket determination that no appointment under Chapter 39 will ever abridge voting rights in a prohibited manner.

Texas concedes that Chapter 39 sanctions, which are designed to give the Commissioner the "necessary tools with which to deal with serious problems that threaten the educational process in a district", are broad, discretionary, and will be delegated so as to respond to a host of different precipitating circumstances. Thus, the "actual contours of [each appointment order] will be determinative of" whether an elected board is displaced or its powers in any way diminished. City of Houston, 24 F.3d at 1431. The broad discretion accorded the Commissioner under the statute demonstrates the necessity of examining the full factual context in which she is acting before deciding whether an action can be precleared. Put simply, that discretion makes the statute one that cannot be analyzed uniformly in Section 5 terms.

Plaintiff relies on Texas v. United States, 866 F. Supp. 20 (D.D.C. 1994) (three-judge court), to support its contention that a blanket preclearance determination can be made in the absence of an actual appointment. In that case, Texas sought preclearance for legislation creating a new water authority governed by an appointed board of directors. 866 F. Supp. at 22-23. That same piece of legislation abolished a water district governed by an elected body. Id. at 22-23. Since de facto replacement of an elected board by an appointed board constitutes a change affecting voting rights under the Voting Rights Act, the specific question at issue was whether the

legislation would affect such a replacement. Id. Texas contended that, since the new authority was not yet functional, it would be impossible to determine whether it was a de facto replacement for the elected district. Id. at 25. The court examined the statute creating the new authority and compared the overlap in function, geography, and control of the new authority and the existing district. The court then held, as a matter of law, that the statute required preclearance because any implementation of the statute would have some effect on voting rights. Id.

United States v. Texas is distinguishable. In that case, one single appointed body was being created that had the potential to interfere with one single elected body in one predetermined way. The statute at issue in this case, by contrast, gives such wide discretion and flexibility to the Commissioner that, absent an actual appointment, there is no way to determine whether an elected school board will be replaced or its powers diminished. Thus, United States v. Texas, confirms our view that this case is not ripe for decision.[3]

Further, the parties cite no prior decision where a district court has addressed section 5 preclearance without a particular challenged voting practice or procedure before it. "Judicial review of this issue 'is likely to stand on a much surer footing in the context of a specific application . . . than could be the case in the framework of the generalized challenge made here.'" City of Houston, 24 F.3d at 1431 (quoting Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 163 (1967)). For all of these reasons, the first prong of the Abbot test is not met and this controversy is not ripe for review.

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[3] The parties also cite Casias v. Moses, No. SA-95-CA-0221 (W.D. Tex. May 11, 1995) (three-judge court) (unpublished). That case is inapposite as it involved the granting of a preliminary injunction pending a determination of whether preclearance was required and did not address the actual merits of the underlying section 5 claim.

The second prong of the Abbott test requires the Court to consider whether withholding judicial decision would cause undue hardship to the party seeking review. City of Houston, 24 F.3d. at 2431-32 (citation omitted); NTEU, 101 F.3d at 1431. Although the determination that Texas will not suffer undue hardship if judicial review is withheld is not necessary to our holding, the Court finds that this second prudential requirement is not met.

Texas alleges that requiring it to seek preclearance each time the Commissioner places a management team or a master in a school district would prevent it from "moving promptly and efficiently to safeguard the education of its children." Texas' Response at 7. This allegation is so vague that it "really amounts only to a complaint that this issue remains unresolved." City of Houston, 24 F.3d at 1432. Again, the Court is unwilling to assume that administrative or judicial preclearance will prove so unwieldly as to deny Texas a meaningful opportunity to expeditiously implement its statutory scheme. Even assuming, arguendo, that Texas is correct, Congress has made the decision that the protection of voting rights outweighs any other State concerns. It is Congress which has struck the balance in favor of preclearance to protect voting interest over school district changes to improve the education process.

Thus, for all the foregoing reasons, we conclude that even if Texas had shown an Article III injury, the State has failed to show under the prudential aspect of the ripeness doctrine, that the court would not be "wasting [its] resources by prematurely entangling [it] in abstract disagreement." NTEU, 101 F.3d at 1431.

IV. Conclusion

Texas has failed to establish that its claim is ripe for judicial review. Thus, the United States' Motion to Dismiss is **granted**.

An Order will issue with this Opinion.

March 5, 1997 /s/
DATE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed March 5, 1997

STATE OF TEXAS, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	:	Civil Action No. 96-1274 (JWR (USCA), AER, GK)

ORDER

Plaintiff, the State of Texas, seeks a declaratory judgment that the preclearance provisions under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, do not apply to §§ 39.131(a)(7) and (8) of the Texas Education Code or, alternatively that they do not apply to actions taken pursuant to the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891(e), to conform with § 39.131 of the Texas Education Code. Three motions are pending before the Court: (1) Defendant United States' Motion to Dismiss [13-1], or in the Alternative, for Judgment on the Pleadings [13-2]; (2) Defendant United States' Motion to Strike [14-1]; and (3) Plaintiff Texas' Motion for Summary Judgment [12-1]. For the reasons discussed in the accompanying memorandum decision, it is this 5th day of March, 1997, hereby

ORDERED, that the Defendant's Motion to Dismiss [13-1] is **granted**; it is further

ORDERED, that, in view of the dismissal of this case, Defendant's Motion for Judgment on the Pleadings [13-2], Defendant's Motion to Strike [14-1], and Plaintiff's Motion for Summary Judgment [12-1] are **denied**.

/s/
GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed March 17, 1997

STATE OF TEXAS, Plaintiff,	:	
v.	:	
	:	Civil Action
UNITED STATES OF AMERICA,	:	No. 96-1274
Defendant.	:	(JWR (USCA), AER, GK)

AMENDED[1] MEMORANDUM OPINION OF THE THREE-JUDGE COURT UNDER THE VOTING RIGHTS ACT

Before Rogers, U.S. Circuit Judge, Robinson, Senior U.S. District Judge, and Kessler, U.S. District Judge.

Opinion for the Court by Kessler, J.

APPEARANCES

FOR THE PLAINTIFF: Javier Aguilar, Office of the Attorney General of the State of Texas, Austin Texas. With him on the pleadings were Dan Morales, Jorge Vega, and Deborah A. Verbil of the Office of the Attorney General of the State of Texas, Austin, Texas.

FOR THE DEFENDANT: Robert A. Kengle, United States Department of Justice, Voting Section, Civil Rights Division,

[1] The Amended Memorandum Opinion of the Three-Judge Court Under the Voting Rights Act contains the signatures of all three participating judges.

Washington, D.C. With him on the pleadings were Elizabeth Johnson and Donna M. Murphy, Voting Section, Civil Rights Division, United States Department of Justice; Deval L. Patrick, Assistant Attorney General, Washington, D.C.; and Eric H. Holder, Jr., United States Attorney, Washington, D.C.

I. INTRODUCTION

Plaintiff, the State of Texas, seeks a declaratory judgment that the preclearance provisions of section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, do not apply to §§ 39.131(a)(7) and (8) of the Texas Education Code or, alternatively, that they do not apply to actions taken pursuant to the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891(e), to conform with § 39.131 of the Texas Education Code. Three motions are pending before the Court: (1) Defendant United States' Motion to Dismiss, or in the Alternative, for Judgment on the Pleadings; (2) United States' Motion to Strike; and (3) Texas' Motion for Summary Judgment. For the reasons discussed below, we **grant** the United States' Motion to Dismiss because the issues presented are not ripe for judicial review.[2]

II. Background[3]

In 1995, the Texas Legislature enacted Chapter 39 of the Texas Education Code ("Chapter 39") as part of Texas Senate Bill 1 ("S.B. 1"). Chapter 39 created an assessment system designed to hold Texas school districts accountable for

---

[2] Because of our disposition of Defendant's Motion to Dismiss, the remaining motions need not be decided.

[3] When deciding a Motion to Dismiss, the court must presume the allegations of a plaintiff's complaint to be true and construe them liberally in its favor. Shear v. National Rifle Ass'n of Am., 606 F.2d 1251, 1253 (D.C. Cir. 1979). All background information is taken from Plaintiff's Complaint ("Compl.").

academic performance levels based on a state administered exam. Compl. ¶¶ 7, 19.

Chapter 39 authorizes the Commissioner of Education ("Commissioner") to impose sanctions on school districts under certain circumstances, including lowered or unimproved accreditation ratings or violations of federal law or regulations regarding federally-required or funded programs. Moreover, the Commissioner is authorized to impose sanctions on a district if an investigation reveals a violation of the state's accountability system, required accounting and financial practices, excessive alternative placements, violation of civil rights or other federally-imposed requirements, or violation of the legally-established roles of superintendent and board of trustees. Compl. ¶¶ 7, 8.

Section 39.131(a) sets forth the sanctions that the Commissioner may impose on a school district "to the extent the Commissioner determines necessary." Of the ten possible sanctions listed in section 39.131(a), two form the core of this litigation: section 39.131(a)(7), which authorizes the Commissioner to appoint a master to oversee a district's operations, and section 39.131(a)(8), which authorizes the Commissioner to appoint a management team to direct the operations of the district in areas of unacceptable performance. Compl. ¶¶ 9-11.

The State of Texas is a jurisdiction covered by section 5 of the Voting Rights Act ("section 5") and must, therefore, obtain preclearance from this Court or from the United States Attorney General (the "Attorney General") prior to implementing changes affecting voting. Compl. ¶¶ 1, 3. After S.B. 1 was passed, Texas submitted portions of the statute to the Attorney General for preclearance. Texas submitted the sanctions provisions of § 39.131 under protest. The Attorney General determined that the sanctions provided for in § 39.131(a)(1)-(6) did not require preclearance. However, she also concluded that Texas must obtain preclearance in each

instance that it appoints a master or a management team to a school district under § 39.131(a)(7) or (8). Compl. ¶ 19.

III. Analysis

The United States has moved to dismiss the Complaint on the ground that Texas' claim is not ripe for judicial review. Before addressing that argument, we note that Texas has presented a claim that does not fit neatly into the statutory framework of section 5. Section 5 prohibits covered jurisdictions from enforcing any change that affects voting without first obtaining "preclearance" either administratively, through the Attorney General, or judicially, through the United States District Court for the District of Columbia. 42 U.S.C. § 1973c.

There are at least three types of actions that may be brought under section 5. Allen v. State Bd. of Elections, 393 U.S. 544, 561 (1969). First, a state may bring an action for judicial preclearance, seeking a declaration that the new rule was not enacted for a discriminatory purpose and will not have a discriminatory effect. Id. Second, an individual may bring a private enforcement action for declaratory judgment and injunctive relief in a local federal district court to block a jurisdiction from enforcing a change that has not been precleared. Id. at 554-57, 561. Finally, the Attorney General may bring an enforcement action. Id. at 561. The jurisdiction of a district court in an enforcement action is quite limited; the court may not make the preclearance determination for itself but must confine its inquiry to whether the enactment at issue was required to be precleared, whether it has been precleared, and what temporary remedy, if any, is appropriate. Lopez v. Monterey County, 117 S. Cit. 340, 349 (1996); United States v. Board of Supervisors, 429 U.S. 642, 645-47 (1977) (per curiam); Perkins v. Matthews, 400 U.S. 379, 383-85 (1971).

Texas' lawsuit does not fall clearly into any of these three categories. In particular, Texas is not seeking preclearance of its legislation. See Texas' Application for a three-judge court, filed June 7, 1996, at 2. Rather, it seeks a

blanket determination that any action pursuant to the Commissioner's new authority under Chapter 39 would not be a change covered by section 5. The statutory basis for jurisdiction over such an action is unclear. Although this Court has addressed issues of section 5 coverage in the past, those claims have arisen in the context of an action for judicial preclearance. See State of Texas v. United States, 866 F. Supp. 20, 24-26 (D.D.C. 1994); State of Texas v. United States, 785 F. Supp. 201, 205-206 (D.D.C. 1992); County Council v. United States, 555 F. Supp. 694, 700-702 (D.D.C. 1983). Even if a statutory basis for jurisdiction exists, however, it is unclear whether such an action would involve a "case or controversy" sufficient to satisfy the requirement of Article III of the Constitution. We need not address these issues, however, because we conclude that the instant case is not ripe for judicial review.

The doctrine of ripeness has an Article III component and a prudential component. National Treasury Employees Union v. United States, 101 F.3d 1423, 1427 (D.C. Cir. 1996) ("NTEU"). The Article III component is closely linked to the doctrine of standing, and "shares the constitutional requirement that an injury-in-fact be certainly impending." Id. Even where this constitutional requirement is satisfied, however, the prudential component of the doctrine requires a court to evaluate "the fitness of the issues for judicial consideration and the hardship to the parties of withholding court consideration." Abbott Labs. Inc. v. Gardner, 387 U.S. 136, 149 (1967). Although the United States refers to the constitutional component of ripeness, its motion focuses primarily on the prudential component of the doctrine. We conclude that neither aspect of the doctrine is satisfied.

A. Article III Ripeness

With regard to the Article III component of the ripeness doctrine, Texas asserts that the injuries it will sustain are "the diminution of the quality of education of all Texas school children," Texas' Response at 3, and an inability to

"mov[e] promptly and efficiently to safeguard the education of its children." Id. at 7.

These are important considerations. However, these injuries are not sufficiently imminent to create a justiciable controversy. If the State of Texas seeks to appoint a management committee or master, it will have two methods for seeking a determination of the applicability of the Voting Rights Act to such appointment: preclearance by the Attorney General or recourse to this Court. Texas' argument assumes that neither the Attorney General nor the courts will grant preclearance, or that proceedings will not be handled expeditiously. These assumptions are, simply, too speculative to sustain a claim. When a "case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all," 13A Wright et al., Federal Practice and Procedure: Jurisdiction 2d § 3532 (1984), Article III's imminence requirement is not satisfied. See Natural Resources Defense Council v. E.P.A., 589 F.2d 156, 166 (D.C. Cir. 1988) (citations and internal quotations omitted).

B. Prudential Ripeness Concerns

To determine whether a particular case meets the prudential aspect of the ripeness doctrine, the court applies the two prong test set forth in Abbott Labs., supra; City of Houston, Tex. v. Department of Housing and Urban Dev., 24 F.3d. 1421, 1430-31 (D.C. Cir. 1994); NTEU, 101 F.3d at 1431. Both prongs of the test must be satisfied before a court may hear a case and render a decision on the merits. Chamber of Commerce of the U.S. v. Reich, 57 F.3d 1099, 1100 (D.C. Cir. 1995) (per curiam).

Under the "fitness of the issues" prong of Abbott Laboratories, the first question for the court is whether this lawsuit raises purely legal questions and is therefore "presumptively suitable for judicial review." City of Houston, 24 F.3d at 1430-31 (quoting Better Gov't Ass'n v. Department of State, 780 F.2d 86, 92 (D.C. Cir. 1986)). Judicial action is not appropriate where a claim is dependent on issues of fact.

Office of Communication of the United Church of Christ v. F.E.C., 826 F.2d 101, 105 (D.C. Cir. 1987). Even if the claim raises only legal issues, however, the court must also consider whether it or the parties would benefit from postponing review until the challenged issue has "sufficiently 'crystallized' by taking on a more definite form." City of Houston, 24 F.3d at 1431 (quoting Better Gov't, 780 F.2d at 92).

Under the statutory scheme contained in Section 5, when preclearance is not granted, as in this case, the political entity must seek a determination each time it seeks to act that its action does not abridge voting rights in a discriminatory manner.

Texas argues that its claim presents a purely legal issue of statutory interpretation, namely, whether § 39.131 constitutes a change affecting voting requiring preclearance under section 5 of the Voting Rights Act. In effect, it asks for a blanket determination that no appointment under Chapter 39 will ever abridge voting rights in a prohibited manner.

Texas concedes that Chapter 39 sanctions, which are designed to give the Commissioner the "necessary tools with which to deal with serious problems that threaten the educational process in a district", are broad, discretionary, and will be delegated so as to respond to a host of different precipitating circumstances. Thus, the "actual contours of [each appointment order] will be determinative of" whether an elected board is displaced or its powers in any way diminished. City of Houston, 24 F.3d at 1431. The broad discretion accorded the Commissioner under the statute demonstrates the necessity of examining the full factual context in which she is acting before deciding whether an action can be precleared. Put simply, that discretion makes the statute one that cannot be analyzed uniformly in Section 5 terms.

Plaintiff relies on Texas v. United States, 866 F. Supp. 20 (D.D.C. 1994) (three-judge court), to support is contention that a blanket preclearance determination can be made in the absence of an actual appointment. In that case, Texas sought

preclearance for legislation creating a new water authority governed by an appointed board of directors. 866 F. Supp. at 22-23. That same piece of legislation abolished a water district governed by an elected body. Id. at 22-23. Since de facto replacement of an elected board by an appointed board constitutes a change affecting voting rights under the Voting Rights Act, the specific question at issue was whether the legislation would affect such a replacement. Id. Texas contended that, since the new authority was not yet functional, it would be impossible to determine whether it was a de facto replacement for the elected district. Id. at 25. The court examined the statute creating the new authority and compared the overlap in function, geography, and control of the new authority and the existing district. The court then held, as a matter of law, that the statute required preclearance because any implementation of the statute would have some effect on voting rights. Id.

United States v. Texas is distinguishable. In that case, one single appointed body was being created that had the potential to interfere with one single elected body in one predetermined way. The statute at issue in this case, by contrast, gives such wide discretion and flexibility to the Commissioner that, absent an actual appointment, there is no way to determine whether an elected school board will be replaced or its powers diminished. Thus, United States v. Texas, confirms our view that this case is not ripe for decision.[4]

Further, the parties cite no prior decision where a district court has addressed section 5 preclearance without a particular challenged voting practice or procedure before it. "Judicial review of this issue 'is likely to stand on a much surer

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[4] The parties also cite Casias v. Moses, No. SA-95-CA-0221 (W.D. Tex. May 11, 1995) (three-judge court) (unpublished). That case is inapposite as it involved the granting of a preliminary injunction pending a determination of whether preclearance was required and did not address the actual merits of the underlying section 5 claim.

footing in the context of a specific application . . . than could be the case in the framework of the generalized challenge made here.'" City of Houston, 24 F.3d at 1431 (quoting Toilet Goods Ass'n v. Gardner, 387 U.S. 158, 163 (1967)). For all of these reasons, the first prong of the Abbot test is not met and this controversy is not ripe for review.

The second prong of the Abbott test requires the Court to consider whether withholding judicial decision would cause undue hardship to the party seeking review. City of Houston, 24 F.3d. at 2431-32 (citation omitted); NTEU, 101 F.3d at 1431. Although the determination that Texas will not suffer undue hardship if judicial review is withheld is not necessary to our holding, the Court finds that this second prudential requirement is not met.

Texas alleges that requiring it to seek preclearance each time the Commissioner places a management team or a master in a school district would prevent it from "moving promptly and efficiently to safeguard the education of its children." Texas' Response at 7. This allegation is so vague that it "really amounts only to a complaint that this issue remains unresolved." City of Houston, 24 F.3d at 1432. Again, the Court is unwilling to assume that administrative or judicial preclearance will prove so unwieldly as to deny Texas a meaningful opportunity to expeditiously implement its statutory scheme. Even assuming, arguendo, that Texas is correct, Congress has made the decision that the protection of voting rights outweighs any other State concerns. It is Congress which has struck the balance in favor of preclearance to protect voting interest over school district changes to improve the education process.

Thus, for all the foregoing reasons, we conclude that even if Texas had shown an Article III injury, the State has failed to show under the prudential aspect of the ripeness doctrine, that the court would not be "wasting [its] resources by prematurely entangling [it] in abstract disagreement." NTEU, 101 F.3d at 1431.

IV. Conclusion

Texas has failed to establish that its claim is ripe for judicial review. Thus, the United States' Motion to Dismiss is **granted**.

An Order will issue with this Opinion.

March 7, 1977 /s/
DATE JUDITH W. ROGERS
UNITED STATES CIRCUIT JUDGE

March 6, 1997 /s/
DATE GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

March 13, 1997 /s/
DATE AUBREY E. ROBINSON, JR.
UNITED STATES SENIOR DISTRICT JUDGE

Copies To:

U.S. Department of Justice
Assistant Attorney General
Civil Rights Division
Washington, D.C. 20530

Javier Aguilar
Special Assistant Attorney General
P.O. Box 12548, Capitol Station
Austin, TX 78711-2548

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed March 17, 1997

STATE OF TEXAS, Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	: : : : : :	Civil Action No. 96-1274 (JWR (USCA), AER, GK)

AMENDED[1] ORDER

Plaintiff, the State of Texas, seeks a declaratory judgment that the preclearance provisions under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, do not apply to §§ 39.131(a)(7) and (8) of the Texas Education Code or, alternatively that they do not apply to actions taken pursuant to the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891(e), to conform with § 39.131 of the Texas Education Code. Three motions are pending before the Court: (1) Defendant United States' Motion to Dismiss [13-1], or in the Alternative, for Judgment on the Pleadings [13-2]; (2) Defendant United States' Motion to Strike [14-1]; and (3) Plaintiff Texas' Motion for Summary Judgment [12-1]. For the reasons discussed in the accompanying memorandum decision, it is this *17th* day of March, 1997, hereby

ORDERED, that the Defendant's Motion to Dismiss [13-1] is **granted**; it is further

ORDERED, that, in view of the dismissal of this case, Defendant's Motion for Judgment on the Pleadings [13-2],

[1] The Amended Order contains the signatures of all three participating judges.

Defendant's Motion to Strike [14-1], and Plaintiff's Motion for Summary Judgment [12-1] are **denied**.

/s/
JUDITH W. ROGERS
UNITED STATES CIRCUIT JUDGE

/s/
GLADYS KESSLER
UNITED STATES DISTRICT JUDGE

/s/
AUBREY E. ROBINSON, JR.
UNITED STATES SENIOR
DISTRICT JUDGE

Copies To:

U.S. Department of Justice
Assistant Attorney General
Civil Rights Division
Washington, D.C 20530

Javier Aguilar
Special Assistant Attorney General
P. O. Box 12548, Capitol Station
Austin, TX 78711-2548

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed April 23, 1997

STATE OF TEXAS, Plaintiff,	*	
	*	Civil Action
v.	*	No. 96-1274 (GK)
UNITED STATES OF AMERICA, Defendant.	*	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Pursuant to Rule 18.1 of the rules of the Supreme Court of the United States, notice is given that the State of Texas appeals to the Supreme Court of the United States from the three-judge Court's Order of March 5, 1997, granting the United States' Motion to Dismiss, and denying the State of Texas' Motion for Summary Judgment.

This appeal is taken pursuant to 42 U.S.C. § 1973c, and 28 U.S.C. § 2101(b).

Respectfully submitted,
DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

/s/
JAVIER AGUILAR
Special Assistant Attorney General

DEBORAH A. VERBIL
Special Assistant Attorney General

P.O. Box 12548, Capitol Station
Austin, Texas 78711-2548
(512) 463-2191
(512) 463-2063 FAX
ATTORNEYS FOR STATE OF TEXAS

CERTIFICATE OF SERVICE

I hereby certify that I forwarded a copy of the foregoing document via certified mail return receipt requested to ROBERT A. KENGLE, Attorney, Department of Justice, Voting Section, Civil Rights Division, 320 1st St., N.W., Room 826, Washington, D.C. 20534, on this 22nd day of April, 1997.

/s/
JAVIER AGUILAR
Special Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed May 12, 1997

STATE OF TEXAS,	*
Plaintiff,	*
	*Civil Action
v.	*No. 96-1274 (GK)
	*
UNITED STATES OF AMERICA,	*
Defendant.	*

SUPPLEMENTAL NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Pursuant to Rule 18.1 of the Rules of the Supreme Court of the United States, notice is given that the State of Texas appeals to the Supreme Court of the United States from the Court's Order of March 5, 1997, and the Amended Order of March 17, 1997, granting the United States' Motion to Dismiss, and denying the State of Texas' Motion for Summary Judgment.

This appeal is taken pursuant to 42 U.S.C. § 1973c, and 28 U.S.C. § 2101(b).

Respectfully submitted,
D AN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

/s/
JAVIER AGUILAR
Special Assistant Attorney General

DEBORAH A. VERBIL
Special Assistant Attorney General

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(512) 463-2191, (512) 463-2063 FAX

CERTIFICATE OF SERVICE

I hereby certify that I forwarded a copy of the foregoing document via certified mail return receipt requested to ROBERT A. KENGLE, Attorney, Department of Justice, Voting Section, Civil Rights Division, 320 1st St., N.W., Room 826, Washington, D.C. 20534, on this 9th day of May, 1997.

/s/
JAVIER AGUILAR
Special Assistant Attorney General

June 12, 1995

Assistant Attorney General
U.S. Department of Justice
Civil Rights Division
Voting Section
P.O. Box 66128
Washington, D.C. 20035-6128

Re: Submission under Section 5, Voting Rights Act, of Senate Bill 1, 74th Legislature, 1995.

EXPEDITED REVIEW REQUESTED

Dear Sir or Madam:

The legislature of the State of Texas has enacted Senate Bill 1, 74th Legislature, 1995, which concerns revision of the Texas Education Code.

Pursuant to the requirements of 28 C.F.R. § 51.27, the following information is submitted with respect to this Act:

(a) & (b) A certified copy of the Act is enacted herewith.

(c) The State respectfully requests expedited consideration. Senate Bill 1 comprises amendments to and recodification of substantial portions of the Texas Education Code.

Senate Bill 7, 1993, 73rd Legislature, required that by September 1, 1995, the Education Code, with the exception of its school finance chapters, be repealed. Senate Bill 7 instructed the Commissioner of Education to propose revisions of the Education Code, which was completed in July of 1994. Senate Bill 7 also created the Joint Select

Committee to Review the Central Education Agency to focus attention on the delivery of educational programs and services in the Texas public school system. The Joint Committee, made up of five senators, five representatives, and seven public members, adopted 64 recommendations that included suggestions to adopt a single set of measurable goals for public education, impose a zero tolerance student discipline program, create a State Board for Educator Certification and look into certain "school choice" options such as intradistrict transfers, magnet schools, and charter schools.

It is our understanding that many of the over 1000 school districts in Texas will need to proceed as soon as possible in order to implement various provisions of the Act for the 1995-1996 school year. The need for expedited review is especially necessary insofar as the school districts will need to allow time for their own local submissions to the Department if they make changes based on the enabling legislation. We request expedited review as to the entire Act. In the event the Department concludes that any portion of the Act precludes expedited review, we respectfully urge the Department to grant partial preclearance to the remainder on an expedited basis.

The changes to election-related procedures are described below. In a number of instances, certain provisions either substantially recodify current law which has been precleared, or do not effect election-related changes in the opinion of our office; however, we enclose the entire text of Senate Bill 1 for your reference. For your convenience, in lieu of photocopies of the relevant provisions from Texas Vernon's Civil Statutes, we enclose the 1994 Texas School Law Bulletin, (published by West Publishing Company, in cooperation with the Texas Education Agency), which reflects the existing law in the Texas Education Code, the

Texas Tax Code, the Texas Government Code, and the Texas Election Code. Notwithstanding the repeal of many of the Education Code provisions and the effective dates of Senate Bill 1 (1995), references to "existing" or "current" law are to the Education Code prior to SB 1 (1995); references to "new" or "proposed" law are to SB 1 enactments. All references are to the Texas Education Code, unless otherwise cited.

. . .

CHAPTER 39. ACCOUNTABILITY

The accountability provisions under current law (Chapter 35) and the proposed law (Chapter 39) include the authority of the Texas Education Agency to send in a management team which could exercise the powers of the school board indefinitely. In recent litigation, issues arose concerning whether the temporary emergency exercise of authority by the management team amounted to a de facto replacement of the elected board with an appointive authority which might require submission and preclearance. Casias v. Moses, No. SA-95-CA-0221 (W.D. Tex. May 11, 1995) (order granting preliminary injunction).

Section 39.131(e). In partial response to the concerns voiced by the court, SB 1 changes the management team procedures as follows. New Section 39.131(e) provides, among other things, that the management team: (1) may not take any action concerning the conducting of the district's election, and may not change the number of or method of electing trustees; (2) may not set a tax rate for the district; and (3) may not adopt a budget that provides for spending a different amount from a previously adopted budget. In addition, the commissioner shall review the need for a master or management team at least every 90 days and shall remove the master or team unless the commissioner determines that the continued appointment is necessary.

Sections 39.131(g)-(h). The commissioner may also order a board of 15 managers to govern the school district. Under the board of managers, who must be residents of the district, the powers of the school district are suspended. In effect, the commissioner is appointing a new, temporary, 15-member school board, with more than double the resident membership of most boards. The elected school board may still submit amendments to the budget for the commissioner's consideration. This procedure in general codifies existing law which has been submitted to the Department as part of attachments to past submissions, (e.g., SB 7 (1993)), but the procedure was not previously identified as an election-related change, and has not been so addressed in the Department's 1993 correspondence to our office. In our opinion, as the permanent elective structure of the board of trustees is not altered by these temporary emergency procedures, neither this section nor the management team procedures in Section 39.131(e) are election-related, and do not require preclearance; nevertheless, we bring these sections to your attention for your consideration.

Section 39.131(a)(10) also cross-references the authority of the commissioner to consolidate an academically unacceptable district with another district pursuant to new Section 13.054, which recodifies existing law. In the case of a home-rule district, the commissioner may request the State Board of Education to revoke the charter.

. . .

CHARTER 39 (ACCOUNTABILITY)

Current law is at Chapter 35. Except for the noted changes, Chapter 39 codifies current Education Code Chapter 35. Chapter 35 was last amended by Senate Bill 7 (1993). The

State submitted a certified copy of the text of Senate Bill 7, but did not identify any of the Chapter 35 procedures as election-related changes, and they were not identified in the Department's preclearance letter of July 6, 1993, DJ File No. 93-1945.

. . .

Sincerely,

/s/

Antonio O. Garza, Jr.

AOG:TH:MB:id

Enclosures Minority Contacts
Certified Copy, Senate Bill 1
Texas School Law Bulletin, 1994 edition

December 11, 1995

The Honorable Antonio O. Garza, Jr.
Secretary of State
Elections Division
P. O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Secretary:

This refers to Chapter 7, Subchapter D; Chapter 11, Subchapter C; Chapter 12; Chapter 13; and Chapter 39 of Senate Bill 1 (1995) which concern the Texas Education Code, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your response to our August 14, 1995, request for additional information on October 10, 1995, supplemental information was received on December 4, 1995.

As you know, the State has an obligation under Section 5 of the Voting Rights Act to "identify with specificity, all voting changes contained in a submission. Clark v. Roemer, 500 U.S. 646, 658 (1991); see also Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended, 28 C.F.R. 51.26 (d) and 51.27 (c). Because the State in its original submission did not identify with sufficient particularity all of the voting changes contained in Senate Bill 1 (1995), our August 14, 1995 letter left open the possibility that additional voting changes might be identified. In this regard, we now have identified several additional voting changes to be added to those enumerated in our earlier letter. Therefore, while this letter addresses all of the voting changes included in Senate Bill 1 that have been identified to date either by your letters or our review, if other voting changes contained therein subsequently are identified, they will be subject to Section 5 review.

. . .

We have considered the following voting changes contained in S.B. 1:

. . .

Chapter 39, which authorizes the Texas Education Agency to appoint a master, management team, and/or board of managers that will exercise the school boards' powers and thus replace school boards indefinitely; annex one school district to another; and revoke the charter of a home-rule school district.

. . .

In addition, the Attorney General does not interpose any objection to the following changes, which are enabling in nature and will require the State and/or local school districts proposing to implement voting changes pursuant to these provisions to seek Section 5 preclearance. See 28 C.F.R. 51.15. However, we have set these voting changes apart from those above, because it is apparent that under certain foreseeable circumstances their implementation may result in a violation of Section 5. As a result, we feel compelled to point out the potential voting rights problems the State and local school districts may encounter in adopting voting changes pursuant to these provisions.

. . .

With regard to Chapter 39, insofar as this provision authorizes the Texas Education Agency to do the following: appoint a master, management team, or board of managers that will exercise a school board's powers; annex one school district to another; and revoke the charter of a home-rule

school district, it clearly contains voting changes. See Bunton v. Patterson, 393 U.S. 544, 569-570 (1969) (companion case to Allen v. State Board of Elections); see also Presley v. Etowah County Commission, 502 U.S. 491 (1992); State of Texas v. United States, 866 F. Supp. 20 (D.C.C. 1994); Casias v. Moses, Civil Action No. SA-95-CA-0221 (W.D. Tx. May 11, 1995).

In particular, Senate Bill 1 retains the exact language (Sections 39.131(e)(1) and (2)), the Court in Casias v. Moses, Civil Action No. SA-95-CA-0221 (W.D. Tx. May 11, 1995), found "could result in the replacement of the elected Board with the appointed management team." Id. at 8. However, S.B. 1 slightly narrows the scope of the functions that may be performed by a master or management team (but not by a board of managers) by including language that prevents them from taking any action concerning a district election, changing the number of and method of selecting trustees, setting a tax rate for the district, or adopting or altering a budget for the school district. S.B. 1 also limits the duration of the appointment of a master or management team by requiring renewal every 90 days. However, these "limitations" do not exempt the State from the holding in Casias v. Moses, because S.B. 1 still potentially allows for the "take-over" of a school board such that the board cannot perform the functions that are its "reason for being." See State of Texas v. United States, 866 F. Supp. 20, 26 (D.C.C. 1994).

Thus, the Attorney General does not interpose any objection to the voting changes caused by Chapter 39, which are enabling in nature. However, any voting change made pursuant to Chapter 39 - including but not limited to the replacement, de facto or otherwise, of an elected school board by an appointed master management team, or board of managers, the annexation of one school district to another,

and the revocation of a home-rule school district's charter, — must either be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that it does not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group prior to their implementation. See 28 C.F.R. 51.10, 51.15.

. . .

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

By: /s/

for Elizabeth Johnson
Acting Chief, Voting Section

January 26, 1996

Honorable Michael A. Moses
Commissioner of Education
Texas Education Agency
1701 North Congress Avenue
Austin, Texas 78701-1494

Dear Commissioner Moses:

It is my pleasure to inform you that I have selected Texas to be one of the six states to participate in the Education Flexibility Partnership Demonstration Program established by the Goals 2000: Educate America Act.

The Ed-Flex program is a striking example of the new partnership that this Administration is forming with States and communities to help every student learn to challenging standards. Texas's selection gives it the authority to grant waivers of the requirements of Federal education programs, as described below. Texas is granted authority to approve waivers not only for individual school districts and schools, but on a statewide basis.

Texas has demonstrated its commitment to promoting flexibility, accountability, and effective innovation in order to improve teaching and learning. Moreover, the State has put forth a strong plan for using Federal waiver authority effectively. I am confident that Texas, as an Ed-Flex Partnership State, will exercise its authority in a manner that furthers the objectives of its comprehensive plan for educational improvement and provides accountability for results.

In making this selection, I am approving the State's Ed-Flex plan and delegating to Texas the authority to waive

requirements applicable to specified programs in the Elementary and Secondary Education Act and the Perkins Act, subject to certain exclusions listed in the statute. This delegation is good for five years, and applies to waivers sought by individual local educational agencies and schools, as well as waivers that apply on a statewide basis. As you are aware, Ed-Flex does not, in any way, modify the State's obligations with respect to civil rights. The enclosed memorandum explains the waiver authority in greater detail.

Regarding the Texas Education Agency's separately pending waiver request concerning state review of changes or modifications in local consolidated plans, in light of the excellent progress that we have made in working with the Agency and in order to reach a timely resolution of the issues, we will continue to work with you on that request. Therefore, it is not covered in this delegation.

We intend to provide you with whatever further assistance you may need as Texas begins to evaluate specific waiver requests. Moreover, we anticipate working together in a variety of ways to ensure that this demonstration program will improve the Nation's understanding of how such authority can assist States to improve teaching and learning for all students.

Again, many congratulations on Texas's achievement.

Yours sincerely,
/s/
Richard W. Riley

Enclosure

cc: Honorable George W. Bush

In addition, the Secretary has determined that Federal health and safety requirements and Federal civil rights requirements may not be waived. Federal civil rights requirements include:

(1) Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., and regulations at 34 CFR Part 100;
(2) Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 et seq., and regulations at 34 CFR Part 106;
(3) Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and regulations at 34 CFR Part 104;
(4) The Americans with Disabilities Act of 1990, 42 U.S.C. 12101 et seq.; and
(5) The Age Discrimination Act of 1975, 42 U.S.C. 6101 et seq., and regulations at 34 CFR Part 110.

The Secretary emphasizes that this delegation of authority does not, in any way, alter the obligations of the State with respect to any civil rights-related court orders which apply to the State. Also, the Secretary notes that the Individuals with Disabilities Education Act (IDEA) is not one of the enumerated programs covered by the Ed-Flex waiver authority.

Because parental participation and involvement requirements may not be waived, and the scope of the waiver authority may not be extended beyond requirements applicable to the enumerated programs. Texas is precluded from waiving requirements of the Family Educational Rights and Privacy Act (section 444 of GEPA) and the Protection of Pupil Rights Act (section 445 of GEPA).

In designating Texas as an Ed-Flex State, the Secretary does not necessarily endorse specific waiver examples included in the Ed-Flex plan. The Department will be happy to provide Texas with additional guidance on the scope of the Ed-Flex waiver authority, including further information on the exclusions discussed above.

Accountability

Texas is reminded of its responsibility under section 311(e)(7) of the Goals 2000 Act to monitor annually the activities of LEAs and schools receiving waivers under the Ed-Flex program, and to submit an annual report to the Secretary regarding progress toward achieving the objectives of its Ed-Flex plan. The Secretary emphasizes that the increased flexibility provided by Ed-Flex is in exchange for accountability for results and that Texas is accountable for the progress of all students under this demonstration. Texas should take any steps necessary to ascertain such progress, including disaggregation of data and testing of limited English proficient students, consistent with State law.

The Department will provide, at a later date, additional guidance to the State concerning monitoring and reporting requirements.

ED-FLEX FACT SHEET
January 29, 1996

What is Ed-Flex?

The Education Flexibility (Ed-Flex) Partnership Demonstration Program was established by the Goals 2000: Educate America Act. In exchange for increased accountability for results, Ed-Flex provides greater State and local flexibility in using Federal education funds to support locally-designed, comprehensive school improvement efforts.

Ed-Flex allows the Secretary of Education to delegate to up to six States, the authority to waive certain Federal statutory or regulatory requirements affecting the State and local school districts and schools. A State that has developed a comprehensive school improvement plan that has been approved by the Secretary may apply for Ed-Flex. In addition, the State must waive its own statutory or regulatory requirements, while holding districts and schools affected by the waivers accountable for the academic performance of their students.

Ed-Flex can help participating States and local school districts use Federal funds in the way that provides maximum support for effective school reform based on challenging academic standards for all students. Ed-Flex partnership States named to date included Oregon, Kansas, Massachusetts, Ohio, and now Texas.

How Can Ed-Flex Help Improve Education in Texas?

Participating in Ed-Flex is a natural next step in the efforts that Texas is making to develop an education system focused on high standards for all students, local flexibility, and strong accountability for results. Ed-Flex gives the Texas

Commissioner of Education the power to waive requirements of certain federal education programs, like the Title I program, or the Eisenhower Professional Development program. Before Ed-Flex, Texas could ask the Secretary of Education to waive these requirements; now, Texas has the authority to make those decisions at the state level.

If individual schools need waivers to carry out their local school reform efforts, they can seek a waiver from the Texas Education Agency. Likewise, based on experience and feedback from schools and local communities, the Commissioner can approve a single waiver that will apply to many districts across the state at one time. Texas will use the results of its Texas Assessment of Academic Skills and other approaches to monitor the effectiveness of waivers.

Which Federal Education Program Requirements May be Waived?

Under Ed-Flex, a State may waive requirements relating to several programs:

✓Title I of the Elementary and Secondary Education Act (ESEA), including:
✓Part A (Helping Disadvantaged Children Meet High Standards)
✓Part B (Even Start)
✓Part C (Migrant Education)
✓Part D (Neglected, Delinquent, and At-Risk Youth)
✓Title II of the ESEA (Eisenhower Professional Development)
✓Title IV of the ESEA (Safe and Drug-Free Schools and Communities)
✓Title VI of the ESEA (Innovative Education Program Strategies)

✓Title VII, Part C of the ESEA (Emergency Immigrant Education)
✓The Carl D. Perkins Vocational and Applied Technology Education Act

A State may also waive certain requirements of the General Education Provisions Act (GEPA) and the Education Department General Administrative Regulations (EDGAR) applicable to the covered programs.

Before granting a waiver, a State must first determine that the underlying purposes of the affected program will continue to be met.

What Requirements May Not Be Waived?

While the Ed-Flex waiver authority is broad, the law makes clear that some requirements may not be waived, including those pertaining to health, safety, and civil rights. In addition, the Individuals with Disabilities Education Act (IDEA) is not covered by Ed-Flex. Importantly, Ed-Flex does not, in any way, alter the obligations of a participating State with respect to any civil rights-related court orders. Such waivers would not be consistent the purpose of the Ed-Flex demonstration, which is to strengthen effective school reform efforts for all children.

The strong involvement of parents in their children's education is vital to successful school improvement efforts. The law makes clear the participating States are prohibited from waiving requirements relating to parental participation and involvement.

How Will Ed-Flex Work in Practices?

To see how Ed-Flex can work in practice, imagine that you are the superintendent of a small school district. The district has generally done well in all the areas on the TAAS test except reading, in which scores have been very disappointing. Principals, teachers, and parents at all the schools in the district are eager to raise the quality of their reading programs, and they have built strategies for addressing this need in the local school improvement plan.

In order for the local effort of succeed, one of the things the district will need is solid professional development for teachers. Federal Title II (Eisenhower) funds are available for this type of training, but because of the level of funding Congress has made available, most of the money is required to go into math and science education — even though these are the very subjects the district is performing best in.

After consulting with teachers, parents, and members of the business community, and with the consensus of local decision-making committees and the school board, you ask the Commissioner to waive the Eisenhower requirement so that, during the next three school years, you can devote up to 75% of your Title II funds to adopting an exciting new reading program based on high expectations for students. In exchange for this flexibility, and consistent with the local school plan, you pledge to make significant progress in several measures of student reading ability. In particular, you state that each year for the next three years, there will be an improvement of four percentage points in the number of students who demonstrate reading proficiency on the TAAS test.

After reviewing your request, the Commisioner agrees that the waiver will remove a barrier to the district's reform plan

and is consistent with the purposes of the Eisenhower program, and so the request is approved. Schools in your district can begin using 75% of their Eisenhower funds for professional development in reading. Each year you will report to the Commissioner on the progress you have made under your waiver, especially the progress you are making towards the student achievement goals you selected. The Commissioner will take this information into account in determining whether you should continue to have the waiver or, perhaps, whether the waiver should be extended.

If the Commissioner gets numerous requests from districts like yours, and determines that it will support the state's system-wide effort to improve education, he can decide to waive the requirement for virtually *any* district that requests the added flexibility in order to improve teaching and learning. Schools can then notify the Commissioner that they would like to participate, and appropriate schools will be approved.

Have Any Texas School Districts Previously Received Waivers of Federal Program Requirements?

Last year, the Fort Worth, Texas School District received a waiver allowing it to target an extra portion of its Title I dollars to four high poverty, inner-city elementary schools. The schools were chosen for a complete overhaul due to low achievement on the TAAS and other factors. Each school uses Title I funds to improve instruction for all its students and is reorganizing staff, lengthening the school year, focusing on teaching reading and math, providing extensive teacher training, and strengthening links to the community.

What Are Some Other Examples of Waivers That Can Be Given?

Here are two other waivers that have been approved by the Secretary, and which are representatives of the types of waivers Texas might consider in order to improve academic achievement.

As part of Oregon's comprehensive school improvement efforts, the State's Department of Education received a waiver to form innovative consortia, including both community colleges and school districts, for the use of Perkins funds. The consortia will receive Perkins funds to provide high quality vocational education programs to both high school and postsecondary students. Without the waiver, this type of collaboration would not have been possible.

Following careful planning, the Nash-Rocky Mount School District in North Carolina received a one-year head start on beginning a Title I schoolwide program in a high poverty elementary school. The school will use its funds to improve teaching and learning for all its students.

20 U.S.C. § 5801

§ 5801. Purpose

The purpose of this chapter is to provide a framework for meeting the National Education Goals established by subchapter I of this chapter by--

(1) promoting coherent, nationwide, systemic education reform;

(2) improving the quality of learning and teaching in the classroom and in the workplace;

(3) defining appropriate and coherent Federal, State, and local roles and responsibilities for education reform and lifelong learning;

(4) establishing valid and reliable mechanisms for--

(A) building a board national consensus on American education reform;

(B) assisting in the development and certification of high-quality, internationally competitive content and student performance standards; and

(C) assisting in the development and certification of high-quality assessment measures that reflect the internationally competitive content and student performance standards;

(D) Redesignated (C)

(5) supporting new initiatives at the Federal, State, local, and school levels to provide equal educational opportunity for all students to meet high academic and occupational skill standards and to succeed in the world of employment and civic participation;

(6) providing a framework for the reauthorization of all Federal education programs by--

(A) creating a vision of excellence and equity that will guide all Federal education and related programs;

(B) providing for the establishment of high-quality, internationally competitive content and student performance standards and strategies that all students will be expected to achieve;

(C) encouraging and enabling all State educational agencies and local educational agencies to develop comprehensive improvement plans that will provide a coherent framework for the implementation of reauthorized Federal education and related programs in an integrated fashion that effectively educates all children to prepare them to participate fully as workers, parents, citizens;

(D) providing resources to help individual schools, including those serving students with high needs, develop and implement comprehensive improvement plans; and

(E) promoting the use of technology to enable all students to achieve the National Education Goals;

(F) Redesignated (E)

(7) stimulating the development and adoption of a voluntary national system of skill standards and certification to serve as a cornerstone of the national strategy to enhance workforce skills; and

(8) assisting every elementary and secondary school that receives funds under this chapter to actively involve parents

and families in supporting the academic work of their children at home and in providing parents with skills to advocate for their children at school.

20 U.S.C. § 5891

§ 5891. Waivers of statutory and regulatory requirements

(a) Waiver authority

(1) In general

Except as provided in subsection (c) of this section, the Secretary may waive any statutory or regulatory requirement applicable to any program or Act described in subsection (b) of this section for a State educational agency, local educational agency, or school if--

(A) and only to the extent that, the Secretary determines that such requirement impedes the ability of the State, or of a local educational agency or school in the State, to carry out the State or local improvement plan;

(B) the State educational agency has waived, or agrees to waive, similar requirements of State law;

(C) in the case of a statewide waiver, the State educational agency--

(i) provides all local educational agencies and parent organizations in the State with notice and an opportunity to comment on the State educational agency's proposal to seek a waiver; and

(ii) submits the local educational agencies' comments to the Secretary; and

(D) in the case of a local educational agency waiver, the local educational agency provides parents, community groups, and advocacy or civil rights groups with the opportunity to comment on the proposed waiver.

(2) Application

(A) (i) To request a waiver under paragraph (1), a local educational agency or school that receives funds under this subchapter, or a local educational agency or school that does not receive funds under this subchapter but is undertaking school reform efforts that the Secretary determines are comparable to the activities described in section 5886 of this title, shall transmit an application for such a waiver to the State educational agency. The State educational agency then shall submit approved applications for waivers under paragraph (1) to the Secretary.

(ii) A State educational agency that receives funds under this subchapter may request a waiver under paragraph (1) by submitting an application for such waiver to the Secretary.

(B) Each application submitted to the Secretary under subparagraph (A) shall--

(i) identify the statutory or regulatory requirements that are requested to be waived and the goals that the State educational agency or local educational agency or school intends to achieve;

(ii) describe the action that the State educational agency has undertaken to remove State statutory or regulatory barriers identified in the application of local educational agencies;

(iii) describe the goals of the waiver and the expected programmatic outcomes if the request is granted;

(iv) describe the numbers and types of students to be impacted by such waiver;

(v) describe a timetable for implementing a waiver; and

(vi) describe the process the State educational agency will use to monitor, on a biannual basis, the progress in implementing a waiver.

(3) Timeliness

The Secretary shall act promptly on a request for a waiver under paragraph (1) and shall provide a written statement of the reasons for granting or denying such request.

(4) Duration

Each waiver under paragraph (1) shall be for a period not to exceed 4 years. The Secretary may extend such period if the Secretary determines that the waiver has been effective in enabling the State or affected local educational agencies to carry out reform plans.

(b) Included programs

The statutory or regulatory requirements subject to the waiver authority of this section are any such requirements under the following programs or Acts:

(1) Title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 6301 et seq.].

(2) Part A of title II of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 6621 et seq.].

(3) Part A of title V of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 7201 et seq.].

(4) Title VIII of the Elementary and Secondary Education Act of 1965 [20 U.S.C.A. § 7701 et seq.].

(5) Part B of the title IX of the Elementary and Secondary Education Act of 1986 [20 U.S.C.A. § 7901 et seq.].

(6) The Carl D. Perkins Vocational and Applied Technology Education Act [20 U.S.C.A. § 2301 et seq.].

(c) Waivers not authorized

The Secretary may not waive any statutory or regulatory requirement of the programs or Acts described in subsection (b) of this section--

(1) relating to--

(A) maintenance of effort;
(B) comparability of services;
(C) the equitable participation of students and professional staff in private schools;
(D) parental participation and involvement; and
(E) the distribution of funds to States or to local educational agencies; and

(2) unless the underlying purposes of the statutory requirements of each program or Act for which a waiver is granted continue to be met to the satisfaction of the Secretary.

(d) Termination of Waivers

The Secretary shall periodically review the performance of any State, local educational agency, or school for which the Secretary has granted a waiver under subsection (a)(1) of this section and shall terminate the waiver if the Secretary determines that the performance of the State, the local educational agency, or the school in the area affected by the waiver has been inadequate to justify a continuation of the waiver.

(e) Flexibility demonstration

(1) Short title

This subsection may be cited as the "Education Flexibility Partnership Demonstration Act".

(2) Program authorized

(A) In general

The Secretary may carry out an education flexibility demonstration program under which the Secretary authorizes not more than 6 State educational agencies serving eligible States to waive statutory or regulatory requirements applicable to 1 or more programs or Acts described in subsection (b) of this section, other than requirements described in subsection (c) of this section, for the State educational agency or any local educational agency or school within the State.

(B) Award rule

In carrying out subparagraph (A), the Secretary shall select for participation in the demonstration program described in subparagraph (A) three State educational agencies serving eligible States that each have a population of 3,500,000 or greater and three State educational agencies serving eligible States that each have a population of less than 3,500,000, determined in accordance with the most recent decennial census of the population performed by the Bureau of the Census.

(C) Designation

Each eligible State participating in the demonstration program described in subparagraph (A) shall be known as an "Ed-Flex Partnership State".

(3) Eligible State

For the purpose of this subsection the term "eligible State" means a State that--

(A) has developed a State improvement plan under section 5886 of this title that is approved by the Secretary; and

(B) waives State statutory or regulatory requirements relating to education while holding local educational agencies or schools within the State that are affected by such waivers accountable for the performance of the students who are affected by such waivers.

(4) State application

(A) Each State educational agency desiring to participate in the education flexibility demonstration program under this subsection shall submit an application to the Secretary at such time, in such manner, and containing such information as the Secretary may reasonably require. Each such application shall demonstrate that the eligible State has adopted an educational flexibility plan for the State that includes--

(i) a description of the process the State educational agency will use to evaluate applications from local educational agencies or schools requesting waivers of--

(I) Federal statutory or regulatory requirements described in paragraph (2)(A); and

(II) State statutory or regulatory requirements

relating to education; and

(ii) a detailed description of the State statutory and regulatory requirements relating to education that the State educational agency will waive.

(B) The Secretary may approve an application described in subparagraph (A) only if the Secretary determines that such application demonstrates substantial promise of assisting the State educational agency and affected local educational agencies and schools within such State in carrying out comprehensive educational reform and otherwise meeting the purposes of this chapter, after considering--

(i) the comprehensiveness and quality of the educational flexibility plan described in subparagraph (A);

(ii) the ability of such plan to ensure accountability for the activities and goals described in such plan;

(iii) the significance of the State statutory or regulatory requirements relating to education that will be waived; and

(iv) the quality of the State educational agency's process for approving applications for waivers of Federal statutory or regulatory requirements described in paragraph (2)(A)

and for monitoring and evaluating the results of such waivers.

(5) Local application

(A) Each local educational agency or school requesting a waiver of a Federal statutory or regulatory requirement described in paragraph (2)(A) and any relevant State statutory or regulatory requirement from a State educational agency shall submit an application to the State educational agency at such time, in such manner, and containing such information as the State educational agency may reasonably require. Each such application shall--

(i) indicate each Federal program affected and the statutory or regulatory requirement that will be waived;

(ii) describe the purposes and overall expected results of waiving each such requirement;

(iii) describe for each school year specific, measurable, educational goals for each local educational agency or school affected by the proposed waiver; and

(iv) explain why the waiver will assist the local educational agency or school in reaching such goals.

(B) A State educational agency shall evaluate an application submitted under

subparagraph (A) in accordance with the State's educational flexibility plan described in paragraph (4)(A).

(C) A State educational agency shall not approve an application for a waiver under this paragraph unless--

(i) the local educational agency or school requesting such waiver has developed a local reform plan that is applicable to such agency or school, respectively; and

(ii) the waiver of Federal statutory or regulatory requirements described in paragraph (2)(A) will assist the local educational agency or school in reaching its educational goals.

(6) Monitoring

Each State educational agency participating in the demonstration program under this subsection shall annually monitor the activities of local educational agencies and schools receiving waivers under this subsection and shall submit an annual report regarding such monitoring to the Secretary.

(7) Duration of Federal waivers

(A) The Secretary shall not approve the application of a State educational agency under paragraph (4) for a period exceeding 5 years, except that the Secretary may extend such period if the Secretary determines that such agency's authority to grant waivers has been

effective in enabling such State or affected local educational agencies or schools to carry out their local reform plans.

(B) The Secretary shall periodically review the performance of any State educational agency granting waivers of Federal statutory or regulatory requirements described in paragraph (2)(A) and shall terminate such agency's authority to grant such waivers if the Secretary determines, after notice and opportunity for hearing, that such agency's performance has been inadequate to justify continuation of such authority.

(f) Accountability

In deciding whether to extend a request for a waiver under subsection (a)(1) of this section, or a State educational agency's authority to issue waivers under subsection (e) of this section, the Secretary shall review the progress of the State educational agency, local educational agency, or school affected by such waiver or authority to determine if such agency or school has made progress toward achieving the desired results described in the application submitted pursuant to subsection (a)(2)(B)(iii) or (e)(5)(A)(ii) of this section.

(g) Publication

A notice of the Secretary's decision to grant waivers under subsection (a)(1) of this section and to authorize State educational agencies to issue waivers under subsection (e) of this section shall be published in the Federal Register and the Secretary shall provide for the dissemination of such notice to

State educational agencies, interested parties, including educators, parents, students, advocacy and civil rights organizations, other interested parties, and the public.

20 U.S.C. § 6301

§ 6301. Declaration of policy and statement of purpose

(a) Statement of policy

(1) In general

The Congress declares it to be the policy of the United States that a high-quality education for all individuals and a fair and equal opportunity to obtain that education are a societal good, are a moral imperative, and improve the life of every individual, because the quality of our individual lives ultimately depends on the quality of the lives of others.

(2) Additional policy

The Congress further declares it to be the policy of the United States to expand the program authorized by this subchapter over the fiscal years 1996 through 1999 by increasing funding for this subchapter by at least $750,000,000 over baseline each fiscal year and thereby increasing the percentage of eligible children served in each fiscal year with the intent of serving all eligible children by fiscal year 2004.

(b) Recognition of need

The Congress recognizes that --

(1) although the achievement gap between disadvantaged children and other children has been reduced by half over the past two decades, a sizable gap remains, and many segments of our society lack the opportunity to become well educated;

(2) the most urgent need for educational improvement is in schools with high concentrations of children from low-income families and achieving the National Education Goals will not be possible without substantial improvement in such schools;

(3) educational needs are particularly great for low-achieving children in our Nation's highest-poverty schools, children with limited English proficiency, children of migrant workers, children with disabilities, Indian children, children who are neglected or delinquent, and young children and their parents who are in need of family-literacy services;

(4) while subchapter I of this chapter and other programs funded under this chapter contribute to narrowing the achievement gap between children in high-poverty and low-poverty schools, such programs need to become even more effective in improving schools in order to enable all children to achieve high standards; and

(5) in order for all students to master challenging standards in core academic subjects as described in the third National Education Goal described in section 5812(3) of this title, students and schools will need to maximize the time spent on teaching and learning the core academic subjects.

(c) What has been learned since 1988

To enable schools to provide all children a high-quality education, this subchapter builds upon the following learned information:

(1) All children can master challenging content and complex problem-solving skills. Research clearly shows that children, including low-achieving children, can succeed when expectations are high and all children are given the opportunity to learn challenging material.

(2) Conditions outside the classroom such as hunger, unsafe living conditions, homelessness, unemployment,

violence, inadequate health care, child abuse, and drug and alcohol abuse can adversely affect children's academic achievement and must be addressed through the coordination of services, such as health and social services, in order for the Nation to meet the National Education Goals.

(3) Use of low-level tests that are not aligned with schools' curricula fails to provide adequate information about what children know and can do and encourages curricula and instruction that focus on the low-level skills measured by such tests.

(4) Resources are more effective when resources are used to ensure that children have full access to effective high-quality regular school programs and receive supplemental help through extended-time activities.

(5) Intensive and sustained professional development for teachers and other school staff, focused on teaching and learning and on helping children attain high standards, is too often not provided.

(6) Insufficient attention and resources are directed toward the effective use of technology in schools and the role technology can play in professional development and improved teaching and learning.

(7) All parents can contribute to their children's success by helping at home and becoming partners with teachers so that children can achieve high standards.

(8) Decentralized decisionmaking is a key ingredient of systemic reform. Schools need the resources, flexibility, and authority to design and implement effective strategies for bringing their children to high levels of performance.

(9) Opportunities for students to achieve high standards can be enhanced through a variety of approaches such as public school choice and public charter schools.

(10) Attention to academics alone cannot ensure that all children will reach high standards. The health and other needs of children that affect learning are frequently unmet,

particularly in high-poverty schools, thereby necessitating coordination of services to better meet children's needs.

(11) Resources provided under this subchapter can be better targeted on the highest-poverty local educational agencies and schools that have children most in need.

(12) Equitable and sufficient resources, particularly as such resources relate to the quality of the teaching force, have an integral relationship to high student achievement.

(d) Statement of purpose

The purpose of this subchapter is to enable schools to provide opportunities for children served to acquire the knowledge and skills contained in the challenging State content standards and to meet the challenging State performance standards developed for all children. This purpose shall be accomplished by --

(1) ensuring high standards for all children and aligning the efforts of States, local educational agencies, and schools to help children served under this subchapter to reach such standards;

(2) providing children an enriched and accelerated educational program, including, when appropriate, the use of the arts, through schoolwide programs or through additional services that increase the amount and quality of instructional time so that children served under this subchapter receive at least the classroom instruction that other children receive;

(3) promoting schoolwide reform and ensuring access of children (from the earliest grades) to effective instructional strategies and challenging academic content that includes intensive complex thinking and problem-solving experiences;

(4) significantly upgrading the quality of isntruction by providing staff in participating schools with substantial opportunities for professional development;

(5) coordinating services under all parts of this subchapter with each other, with other educational services, and, to the extent feasible, with health and social service programs funded from other sources;

(6) affording parents meaningful opportunities to participate in the education of their children at home and at school;

(7) distributing resources, in amounts sufficient to make a difference, to areas and schools where needs are greatest;

(8) improving accountability, as well as teaching and learning, by using State assessment systems designed to measure how well children served under this subchapter are achieving challenging State student performance standards expected of all children; and

(9) providing greater decisionmaking authority and flexibility to schools and teachers in exchange for greater responsibility for student performance.

20 U.S.C. § 6311

§ 6311. State plans

(a) Plans required

(1) In general

Any State desiring to receive a grant under this part shall submit to the Secretary a plan, developed in consultation with local educational agencies, teachers, pupil services personnel, administrators, other staff, and parents, that satisfies the requirements of this section and that is coordinated with other programs under this chapter, the Goals 2000: Educate America Act [20 U.S.C.A. § 5801 et seq.], and other Acts, as appropriate, consistent with section 8856 of this title.

(2) Consolidation plan

A State plan submitted under paragraph (1) may be submitted as part of a consolidation plan under section 8852 of this title.

(b) Standards and assessments

(1) Challenging standards

(A) Each State plan shall demonstrate that the State has developed or adopted challenging content standards and challenging student performance standards that will be used by the State, its local educational agencies, and its schools to carry out this part, except that a State shall not be required to submit such standards to the Secretary.

(B) If a State has State content standards or State student performance standards developed under Title III of the Goals 2000: Educate America Act [20 U.S.C.A. § 5881 et seq.]

and an aligned set of assessments for all students developed under such title, or, if not developed under such title, adopted under another process, the State shall use such standards and assessments, modified, if necessary, to conform with the requirements of subparagraphs (A) and (D) of this paragraph, and paragraphs (2) and (3).

(C) If a State has not adopted State content standards and State student performance standards for all students, the State plan shall include a strategy and schedule for developing State content standards and State student performance standards for elementary and secondary school children served under this part in subjects as determined by the State, but including at least mathematics and reading or language arts by the end of the one-year period described in paragraph (6), which standards shall include the same knowledge, skills, and levels of performance expected of all children.

(D) Standards under this paragraph shall include--

(i) challenging content standards in academic subjects that--

(I) specify what children are expected to know and be able to do;

(II) contain coherent and rigorous content; and

(III) encourage the teaching of advanced skills;

(ii) challenging student performance standards that--

(I) are aligned with the State's content standards;

(II) describe two levels of high performance, proficient and advanced, that determine how well children are mastering the

material in the State content standards; and

(III) describe a third level of performance, partially proficient, to provide complete information about the progress of the lower performing children toward achieving to the proficient and advanced levels of performance.

(E) For the subjects in which students will be served under this part, but for which a State is not required by subparagraphs (A), (B), and (C) to develop, and has not otherwise developed such standards, the State plan shall describe a strategy for ensuring that such students are taught the same knowledge and skills and held to the same expectations as are all children.

(2) Yearly progress

(A) Each State plan shall demonstrate, based on assessments described under paragraph (3), what constitutes adequate yearly progress of--

(i) any school served under this part toward enabling children to meet the State's student performance standards; and

(ii) any local educational agency that received funds under this part toward enabling children in schools receiving assistance under this part to meet the State's student performance standards.

(B) Adequate yearly progress shall be defined in a manner--

(i) that is consistent with guidelines established by the Secretary that result in continuous and substantial yearly

improvement of each local educational agency and school sufficient to achieve the goal of all children served under this part meeting the State's proficient and advanced levels of performance, particularly economically disadvantaged and limited English proficient children; and

(ii) that links progress primarily to performance on the assessments carried out under this section while permitting progress to be established in part through the use of other measures.

(3) Assessments

Each State plan shall demonstrate that the State has developed or adopted a set of high-quality, yearly student assessments, including assessments in at least mathematics and reading or language arts, that will be used as the primary means of determining the yearly performance of each local educational agency and school served under this part in enabling all children served under this part to meet the State's student performance standards. Such assessments shall--

(A) be the same assessments used to measure the performance of all children, if the State measures the performance of all children;

(B) be aligned with the State's challenging content and student performance standards and provide coherent information about student attainment of such standards;

(C) be used for purposes for which such assessments are valid and reliable, and be consistent with relevant, nationally recognized professional and technical standards for such assessments;

(D) measure the proficiency of students in the academic subjects in which a State has adopted challenging content and student performance standards and be administered at some time during--

(i) grades 3 and 5;

(ii) grades 6 throug 9; and

(iii) grades 10 through 12;

(E) involve multiple up-to-date measures of student performance, including measures that assess higher order thinking skills and understanding;

(F) provide for--

(i) the participation in such assessments of all students;

(ii) the reasonable adaptations and accommodations for students with diverse learning needs, necessary to measure the achievement of such students relative to State content standards; and

(iii) the inclusion of limited English proficient students who shall be assessed, to the extent practicable, in the language and form most likely to yield accurate and reliable information on what such students know and can do, to determine such students' mastery of skills in subjects other than English;

(G) include students who have attended schools in a local educational agency for a full academic year but have not attended a single school for a full academic year, however the performance of students who have attended more than one school in the local educational agency in any academic year shall be used only in determining the progress of the local educational agency;

(H) provide individual student interpretive and descriptive reports, which shall include scores, or other

information on the attainment of student performance standards; and

(I) enable results to be disaggregated within each State, local educational agency, and school by gender, by each major racial and ethnic group, by English proficiency status, by migrant status, by students with disabilities as compared to nondisabled students, and by economically disadvantaged students as compared to students who are not economically disadvantaged.

(4) Special rule

Assessment measures that do not meet the requirements of paragraph (3)(C) may be included as one of the multiple measures, if a State includes in the State plan information regarding the State's efforts to validate such measures.

(5) Language assessments

Each State plan shall identify the languages other than English that are present in the participating student population and indicate the languages for which yearly student assessments are not available and are needed. The State shall make every effort to develop such assessments and may request assistance from the Secretary if linguistically accessible assessment measures are needed. Upon request, the Secretary shall assist with the identification of appropriate assessment measures in the needed languages through the Office of Bilingual Education and Minority Languages Affairs.

(6) Standard and assessment development

(A) A State that does not have challenging State content standards and challenging State student performance standards, in at least mathematics and reading or language arts,

shall develop such standards within one year of receiving funds under this part after the first fiscal year for which such State receives such funds after October 20, 1994.

(B) A State that does not have assessments that meet the requirements of paragraph (3) in at least mathematics and reading or language arts shall develop and test such assessments within four years (one year of which shall be used for field testing such assessment), of receiving funds under this part after the first fiscal year for which such State receives such funds after October 20, 1994, and shall develop benchmarks of progress toward the development of such assessments that meet the requirements of paragraph (3), including periodic updates.

(C) The Secretary may extend for one additional year the time for testing new assessments under subparagraph (B) upon the request of the State and the submission of a strategy to correct problems identified in the field testing of such new assessments.

(D) If, after the one-year period described in subparagraph (A), a State does not have challenging State content and challenging student performance standards in at least mathematics and reading or language arts, a State shall adopt a set of standards in these subjects such as the standards and assessments contained in other State plans the Secretary has approved.

(E) If, after the four-year period described in subparagraph (B), a State does not have assessments, in at least mathematics and reading or language arts, that meet the requirement of paragraph (3), and is denied an extension under subparagraph (C), a State shall adopt an assessment that meets the requirement of paragraph (3) such as one contained in other State plans the Secretary has approved.

(7) Transitional assessments

(A) If a State does not have assessments that meet the requirements of paragraph (3) and proposes to develop such

assessments under paragraph (6)(B), the State may propose to use a transitional set of yearly statewide assessments that will assess the performance of complex skills and challenging subject matter.

(B) For any year in which a State uses transitional assessments, the State shall devise a procedure for identifying local educational agencies under paragraphs (3) and (7) of section 6317(d) of this title, and schools under paragraphs (1) and (7) of section 6317(c) of this title, that rely on accurate information about the academic progress of each such local educational agency and school.

(8) Requirement

Each State plan shall describe--

(A) how the State educational agency will help each local educational agency and school affected by the State plan develop the capacity to comply with each of the requirements of sections 6312(c)(1)(D), 6314(b), and 6315(c) of this title that is applicable to such agency or school; and

(B) such other factors the State deems appropriate to provide students an opportunity to achieve the knowledge and skills described in the challenging content standards adopted by the State.

(c) Other provisions to support teaching and learning

Each State plan shall contain assurances that--

(1)(A) the State educational agency will implement a system of school support teams under section 6318(c) of this title, including provision of necessary professional development for those teams;

(B) the State educational agency will work with other agencies, including educational service agencies or other

local consortia, and institutions to provide technical assistance to local educational agencies and schools to carry out the State educational agency's responsibilities under this part, including technical assistance in providing professional development under section 6320 of this title and technical assistance under section 6318 of this title; and

(C)(i) where educational service agencies exist, the State educational agency will consider providing professional development and technical assistance through such agencies; and

(ii) where educational service agencies do not exist, the State educational agency will consider providing professional development and technical assistance through other cooperative agreements such as through a consortium of local educational agencies;

(2) the State educational agency will notify local educational agencies and the public of the standards and assessments developed under this section, and of the authority to operate schoolwide programs, and will fulfill the State educational agency's responsibilities regarding local educational agency improvement and school improvement under section 6317 of this title, including such corrective actions as are necessary;

(3) the State educational agency will provide the least restrictive and burdensome regulations for local educational agencies and individual schools participating in a program assisted under this part;

(4) the State educational agency will encourage the use of funds from other Federal, State, and local sources for schoolwide reform in schoolwide programs under section 6314 of this title;

(5) the Committee of Practitioners established under section 6513(b) of this title will be substantially involved in the development of the plan and will continue to be involved in monitoring the plan's implementation by the State; and

(6) the State will coordinate activities funded under this part with school-to-work, vocational education, cooperative education and mentoring programs, and apprenticeship programs involving business, labor, and industry, as appropriate.

(d) Peer review and secretarial approval

(1) In general

The Secretary shall--

(A) establish a peer review process to assist in the review and recommendations for revision of State plans;

(B) appoint individuals to the peer review process who are representative of State educational agencies, local educational agencies, teachers, and parents;

(C) following an initial peer review, approve a State plan the Secretary determines meets the requirements of subsections (a), (b), and (c) of this section;

(D) if the Secretary determines that the State plan does not meet the requirements of subsection (a), (b), or (c) of this section, immediately notify the State of such determination and the reason for such determination;

(E) not decline to approve a State's plan before--

(i) offering the State an opportunity to revise its plan;

(ii) providing technical assistance in order to assist the State to meet the requirements under subsection (a), (b), and (c) of this section; and

(iii) providing a hearing; and

(F) have the authority to disapprove a State plan for not meeting the requirements of this part, but shall not have the authority to require a State, as a condition of approval of the State plan, to include in, or delete from, such plan one or more

specific elements of the State's content standards or to use specific assessment instruments or items.

(2) Withholding

The Secretary may withhold funds for State administration and activities under section 6318 of this title until the Secretary determines that the State plan meets the requirements of this section.

(e) Duration of plan

(1) In general

Each State plan shall--

(A) remain in effect for the duration of the State's participation under this part; and

(B) be periodically reviewed and revised by the State, as necessary, to reflect changes in the State's strategies and programs under this part.

(2) Additional information

If the State makes significant changes in its plan, such as the adoption of new State content standards and State student performance standards, new assessments, or a new definition of adequate progress, the State shall submit such information to the Secretary.

(f) Limitation on conditions

Nothing in this part shall be construed to authorize an officer or employee of the Federal Government to mandate, direct, or control a State, local educational agency, or school's specific instructional content or student performance standards

and assessments, curriculum, or program of instructions, as a condition of eligibility to receive funds under this part.

(g) Special rule

If the aggregate State expenditure by a State educational agency for the operation of elementary and secondary education programs in the State is less than such agency's aggregate Federal expenditure for the State operation of all Federal elementary and secondary education programs, then the State plan shall include assurances and specific provisions that such State will provide State expenditures for the operation of elementary and secondary education programs equal to or exceeding the level of Federal expenditures for such operation by October 1, 1998.

(h) Redesignated (g)

20 U.S.C. § 6317(d)

§ 6317. Assessment and local educational agency and school improvement

. . .

(d) State review and local educational agency improvement

(1) In general

A State educational agency shall--

(A) annually review the progress of each local educational agency receiving funds under this part to determine whether schools receiving assistance under this part are making adequate progress as defined in section 6311(b)(2)(A)(ii) of this title toward meeting the State's student performance standards; and

(B) publicize and disseminate to local educational agencies, teachers and other staff, parents, students, and the community the results of the State review, including statistically sound disaggregated results, as required by section 6311(b)(3)(I) of this title.

(2) Rewards

In the case of a local educational agency that for three consecutive years has met or exceeded the State's definition of adequate progress as defined in section 6311(b)(2)(A)(ii) of this title, the State may make institutional and individual rewards of the kinds described for individual schools in paragraph (2) of section 6318(c) of this title.

(3) Identification

(A) A State educational agency shall identify for improvement any local educational agency that--

(i) for two consecutive years, is not making adequate progress as defined in section 6311(b)(2)(A)(ii) of this title in schools served under this part toward meeting the State's student performance standards, except that schools served by the local educational agency that are operating targeted assistance programs may be reviewed on the basis of the progress of only those students served under this part; or

(ii) has failed to meet the criteria established by the State through such State's transitional procedure under section 6311(b)(7)(B) of this title for two consecutive years.

(B) Before identifying a local educational agency for improvement under paragraph (1), the State educational agency shall provide the local educational agency with an opportunity to review the school-level data, including assessment data, on which such identification is based. If the local educational agency believes that such identification for improvement is in error due to statistical or other substantive reasons, such local educational agency may provide evidence to the State educational agency to support such belief.

(4) Local educational agency revisions

(A) Each local educational agency identified under paragraph (3) shall, in consultation with schools, parents, and educational experts, revise its local educational agency plan

under section 6312 of this title in ways that have the greatest likelihood of improving the performance of schools served by the local educational agency under this part in meeting the State's student performance standards.

(B) Such revision shall include determining why the local educational agency's plan failed to bring about increased achievement.

(5) State educational agency responsibility

(A) For each local educational agency identified under paragraph (3), the State educational agency shall--

(i) provide technical or other assistance, if requested, as authorized under section 6318 of this title, to better enable the local educational agency to--

(I) develop and implement the local educational agency's revised plan; and

(II) work with schools needing improvement; and

(ii) make available to the local educational agencies farthest from meeting the State's standards, if requested, assistance under section 6318 of this title.

(B) Technical or other assistance may be provided by the State educational agency directly, or by an institution of higher education, a private nonprofit organization, an educational service agency or other local consortium, a technical assistance center, or other entities with experience in assisting local educational agencies improve achievement, and may include--

(i) interagency collaborative agreements between the local educational agency

and other public agencies to provide health, pupil services, and other social services needed to remove barriers to learning; and

(ii) waivers or modification of requirements of State law or regulation (in States in which such waivers are permitted) that impede the ability of a local educational agency to educate students.

(6) Corrective action

(A) Except as provided in subparagraph (C), after providing technical assistance pursuant to paragraph (5) and taking other remediation measures, the State educational agency may take corrective action at any time against a local educational agency that has been identified under paragraph (3), but, during the fourth year following identification under paragraph (3), shall take such action against any local educational agency that still fails to make adequate progress.

(B)(i) Corrective actions are those actions, consistent with State law, determined and made public and disseminated by the State educational agency, which may include--

(I) the withholding of funds;

(II) reconstitution of school district personnel;

(III) removal of particular schools from the jurisdiction of the local educational agency and establishment of alternative arrangements for public governance and supervision of such schools;

(IV) appointment by the State educational agency of a receiver

or trustee to administer the affairs of the local educational agency in place of the superintendent and school board;

(V) the abolition or restructuring of the local educational agency;

(VI) the authorizing of students to transfer from a school operated by one local educational agency to a school operated by another local educational agency; and

(VII) a joint plan between the State and the local educational agency that addresses specific elements of student performance problems and that specifies State and local responsibilities under the plan.

(VIII) Redesignated (VII)

(ii) Notwithstanding clause (i), corrective actions taken pursuant to this part shall not include the actions described in subclauses (I), (II), and (III) of clause (i) until the State has developed assessments that meet the requirements of paragraph (3)(C) of section 6311(b) of this title.

(C) Prior to implementing any corrective action, the State educational agency shall provide due process and a hearing (if State law provides for such due process and a hearing) to any local educational agency identified under paragraph (3) and may refrain from such corrective action for one year after the four-year period described in subparagraph (A) to the extent that the failure to make progress can be

attributed to such extenuating circumstances as determined by the State educational agency.

(7) Special rule

Local educational agencies that for at least two of the three years following identification under paragraph (3) make adequate progress toward meeting the State's standards no longer need to be identified for local educational agency improvement.

42 U.S.C. § 1973c

§ 1973c. Alteration of voting qualifications and procedures; action by State or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three-judge district court; appeal to Supreme Court

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote

for failure to comply with such qualification, prerequisite, standard, practice, or procedure: Provided, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

TEX. EDUC. CODE ANN. § 11.059

§ 11.059 Terms

(a) A trustee of an independent school district serves a term of three or four years.

(b) Elections for trustees with three-year terms shall be held annually. The terms of one-third of the trustees, or as near to one-third as possible, expire each year.

(c) Elections for trustees with four-year terms shall be held biennially. The terms of one-half of the trustees, or as near to one-half as possible, expire every two years.

(d) A board policy must state the schedule on which specific terms expire.

Text of subsec. (e) effective until August 31, 2001

(e) A district in which trustees serve three-year or four-year terms as of January 1, 1995, continues to elect trustees under that system. The board of trustees of a district in which trustees are elected to two-year or six-year terms shall adopt a resolution providing for three-year or four-year terms. After adoption of the resolution, the board may not alter the length of the terms served by district trustees. The transition to three-year or four-year terms begins with the first regular election held after September 1, 1995. Trustees in office on September 1, 1995, shall serve for the remainder of their terms. The resolution must specify the manner in which the transition to staggered three-year or four-year terms is made. The resolution may provide for trustees elected during the transition to draw lots to determine which trustee serves for less than a full term or may specify which position in an election is for less than a full term. This subsection expires August 31, 2001.

TEX. EDUC. CODE ANN. § 39.131(a) and (e)

§ 39.131. Sanctions

(a) If a district does not satisfy the accreditation criteria, the commissioner shall take any of the following actions, listed in order of severity, to the extent the commissioner determines necessary:

(1) issue public notice of the deficiency to the board of trustees;

(2) order a hearing conducted by the board of trustees of the district for the purpose of notifying the public of the unacceptable performance, the improvements in performance expected by the agency, and the sanctions that may be imposed under this section if the performance does not improve;

(3) order the preparation of a student achievement improvement plan that addresses each academic excellence indicator for which the district's performance is unacceptable, the submission of the plan to the commissioner for approval, and implementation of the plan;

(4) order a hearing to be held before the commissioner or the commissioner's designee at which the president of the board of trustee of the district and the superintendent shall appear and explain the district's low performance, lack of improvement, and plans for improvement;

(5) arrange an on-site investigation of the district;

(6) appoint an agency monitor to participate in and report to the agency on the activities of the board of trustees or the superintendent;

(7) appoint a master to oversee the operations of the district;

(8) appoint a management team to direct the operations of the district in areas of unacceptable performance

or require the district to obtain certain services under a contract with another person;

(9) if a district has been rated as academically unacceptable for a period of one year or more, appoint a board of managers composed of residents of the district to exercise the powers and duties of the board of trustees; or

(10) if a district has been rated as academically unacceptable for a period of two years or more, annex the district to one or more adjoining districts under Section 13.054 or in the case of a home-rule school district, request the State Board of Education to revoke the district's home-rule school district charter.

. . .

(e) The commissioner shall clearly define the powers and duties of a master or management team appointed to oversee the operations of the district. At least every 90 days, the commissioner shall review the need for the master or management team and shall remove the master or management team unless the commissioner determines that continued appointment is necessary for effective governance of the district or delivery of instructional services. A master or management team, if directed by the commissioner, shall prepare a plan for the implementation of action under Subsection (a)(9) or (10). The master or management team:

(1) may direct an action to be taken by the principal of a campus, the superintendent of the district, or the board of trustees of the district;

(2) may approve or disapprove any action of the principal of a campus, the superintendent of the district, or the board of trustees of the district;

(3) may not take any action concerning a district election, including ordering or canceling an election or altering the date of or the polling places for an election;

(4) may not change the number of or method of selecting the board of trustees;

(5) may not set a tax rate for the district; and

(6) may not adopt a budget for the district that provides for spending a different amount, exclusive of required debt service, from that previously adopted by the board of trustees.

. . .

No. 97-29

In the Supreme Court of the United States

OCTOBER TERM, 1996

STATE OF TEXAS, APPELLANT

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether the district court correctly concluded that Texas' request for a declaratory judgment to the effect that the appointment by the State Commissioner of Education of a master or management team for a local school district does not require preclearance under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, is not ripe for review.

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STATE OF TEXAS, APPELLANT

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UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

Pursuant to Rule 18.6 of the Rules of this Court, the Acting Solicitor General, on behalf of the United States, respectfully moves that the judgment of the district court be affirmed.

OPINIONS BELOW

The opinion and judgment of the district court (J.S. App. 1a-10a, 11a-12a) are unreported, as are that court's amended opinion and judgment (J.S. App. 13a-23a, 24a-25a).

JURISDICTION

The judgment of the district court was entered on March 5, 1997. A notice of appeal was filed on April 23, 1997. J.S. App. 26a-27a. The jurisdictional statement

was filed in this Court on June 23, 1997. This Court's jurisdiction is invoked under 28 U.S.C. 1253.

STATEMENT

1. Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, provides in pertinent part that, whenever a covered jurisdiction "enact[s] or seek[s] to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or [in] effect" on the date of coverage, the jurisdiction must obtain "preclearance" of the new practice—either by obtaining a determination from the United States District Court for the District of Columbia that the new practice does not discriminate in purpose or effect on the basis of race, or by submitting the new practice to the Attorney General and receiving no objection to the new practice from the Attorney General. See *Clark* v. *Roemer*, 500 U.S. 646, 648-649 (1991). Section 5 of the Voting Rights Act has been held to cover changes "affecting the creation or abolition of an elective office." *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 503 (1992); see *Allen* v. *State Board of Elections*, 393 U.S. 544, 550-551 (1969) (change from election of officials to appointment).

2. Texas is a covered jurisdiction under Section 5. See 28 C.F.R. Pt. 51 App. (1996). School districts in Texas are generally governed by boards of trustees elected by the voters of the district. See Tex. Educ. Code Ann. §§ 11.051-11.063 (West 1996); J.S. 3. In 1995, the Texas legislature enacted provisions in Chapter 39 of the Texas Education Code to promote accountability in the Texas public school system through intervention in local school districts by the State Commissioner of Education (Commissioner). Under

those provisions, the Commissioner may impose sanctions on local school districts in a variety of circumstances, including lowered accreditation ratings, violations of federal law or regulations, or failure to follow prescribed accounting practices. Tex. Educ. Code Ann. § 39.131(a) (West 1996); J.S. App. 2a-3a, 95a.

The sanctions available to the Commissioner vary considerably in the extent to which they may supersede the governing authority of the elected local school boards. For example, six of the ten sanctions available to the Commissioner, including such matters as ordering the school district to prepare a student achievement improvement plan and arranging an on-site visit (Tex. Educ. Code Ann. § 39.131(a)(3) and (5) (West 1996)) do not fundamentally affect the authority of local school boards. By contrast, two sanctions potentially available to the Commissioner under Chapter 39—the appointment of a board of managers to exercise the duties of the school board, and the authority to revoke a home-rule school district charter (Tex. Educ. Code Ann. § 39.131(a)(9) and (10) (West 1996))—would involve the complete ouster of the local school authorities, and it is uncontested here that implementation of those sanctions would require preclearance under Section 5 of the Voting Rights Act.

This case involves two sanctions potentially available to the Commissioner as to which there is a dispute concerning their implications for voting. Under Chapter 39, the Commissioner may appoint a master to "oversee" a local school district's operations. Tex. Educ. Code Ann. § 39.131(a)(7) (West 1996). In addition, the Commissioner may appoint a management team to "direct" operations in a school district's

areas of unacceptable performance. Tex. Educ. Code Ann. § 39.131(a)(8) (West 1996).[1]

Texas maintained that the sanctions available under Section 39.131(a)(7) and (8) of the Education Code do not affect voting within the meaning of Section 5. Nonetheless, the State submitted the new legislation to the Attorney General for preclearance. J.S. App. 30a-34a. The Assistant Attorney General[2] concluded that, "insofar as [Chapter 39] authorizes the Texas Education Agency to do the following: appoint a master, management team, or board of managers that will exercise a school board's powers; annex one school district to another; and revoke the charter of a home-rule school district, it clearly contains voting changes." *Id.* at 36a-37a. While the Assistant Attorney General did not interpose objection to the

[1] Approximately one month before the State submitted the new legislation to the Attorney General for preclearance, a local three-judge district court, acting pursuant to Section 5, entered a preliminary injunction against the appointment, under the authority of an earlier statute, of a management team for the Somerset Independent School District. Neither the predecessor statute nor the appointment of the management team had ever been submitted for preclearance because the State contended that neither affected voting within the meaning of Section 5. The district court granted a preliminary injunction, concluding that the plaintiffs were likely to prevail on the merits of the issue of whether the appointment of a management team was a voting change requiring preclearance under Section 5. See *Casias* v. *Moses*, No. SA-95-CA-0221 (W.D. Tex. May 11, 1995). The old authorizing statute was repealed on May 30, 1995, and was replaced by the provisions of the Education Code now at issue. See *Casias* v. *Moses*, No. SA-95-CA-0221 (W.D. Tex. Jan. 16, 1996) (dismissing as moot).

[2] The Attorney General has delegated the authority to make determinations under Section 5 to the Assistant Attorney General for the Civil Rights Division. 28 C.F.R. 51.8.

voting changes in Chapter 39 that are "enabling in nature," *id.* at 37a, he stated that any actual "voting change made pursuant to Chapter 39—including but not limited to the replacement, *de facto* or otherwise, of an elected school board by an appointed master management team, or board of managers" must be precleared when implemented by the Commissioner. *Id.* at 37a-38a.

3. On June 7, 1996, Texas filed a complaint in the United States District Court for the District of Columbia, seeking a declaration that Section 5 of the Voting Rights Act does not require the State to obtain preclearance of specific implementations of the sanctions authorized by Section 39.131(a)(7) and (8) of the Education Code. The State contended that invocation of those sanctions could not constitute changes with respect to voting. Texas also contended that the sanction provisions do not require preclearance because they are consistent with federal education statutes that require school systems receiving federal financial assistance to have in place provisions for assessment and accountability.

The district court convened a three-judge panel, and on March 5, 1997, the three-judge panel granted the United States' motion to dismiss. J.S. App. 1a-10a. The court concluded that the issues presented are not ripe for judicial review. *Id.* at 2a.

The court first noted that this action "does not fall clearly" into any category of suit contemplated by Section 5. J.S. App. 4a. The suit does not request a determination by the court that the provisions of Chapter 39 are not discriminatory in purpose or effect. Nor is it an action brought by voters to block implementation of an unprecleared change. Rather, the court noted, Texas' lawsuit seeks "a blanket

determination that any action pursuant to the Commissioner's new authority under Chapter 39 would not be a change covered by section 5." *Ibid.* The court found the "statutory basis for jurisdiction over such an action" to be "unclear." *Ibid.* It further observed that "if a statutory basis for jurisdiction exists, however, it is unclear whether such an action would involve a 'case or controversy' sufficient to satisfy the requirement of Article III of the Constitution." *Id.* at 5a.

Without resolving whether Section 5 furnishes a statutory basis for a declaratory judgment action to determine only whether a change in state law requires preclearance under Section 5, the court found that this case is not ripe for adjudication, in both the constitutional and the prudential sense of ripeness. J.S. App. 5a. With respect to the Article III component of ripeness, the court held that the injuries alleged by Texas "are not sufficiently imminent to create a justiciable controversy." *Ibid.* The court noted that Texas' argument that the case is ripe "assumes that neither the Attorney General nor the courts will grant preclearance, or that [the] proceedings will not be handled expeditiously" if the Commissioner eventually sought to impose one of the pertinent sanctions on a local school board. *Id.* at 6a. "These assumptions," the court held, are "simply, too speculative to sustain a claim." *Ibid.*

Regarding the prudential aspect of ripeness, the court held that the issues presented fail to satisfy the test set forth in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 148-149 (1967), for a ripe challenge to an agency's interpretation of a statute before enforcement by that agency. First, the court noted, this case does not concern purely legal questions. Rather, the

powers given by Chapter 39 to the Education Commissioner are "broad, discretionary, and will be delegated so as to respond to a host of different precipitating circumstances. Thus, the actual contours of [each appointment order] will be determinative of whether an elected board is displaced or its powers in any way [are] diminished." J.S. App. 7a (internal quotation marks and citation omitted). "The statute at issue in this case * * * gives such wide discretion and flexibility to the Commissioner that, absent an actual appointment, there is no way to determine whether an elected school board will be replaced or its powers diminished." *Id.* at 8a.

Applying the second prong of the *Abbott* test, the court also held that withholding judicial decision at this stage would not cause "undue hardship" to Texas. J.S. App. 9a. The court was "unwilling to assume that administrative or judicial preclearance will prove so unwieldly as to deny Texas a meaningful opportunity to expeditiously implement its statutory scheme." *Ibid.* The court also remarked that "Congress has made the decision that the protection of voting rights outweighs any other State concerns," and that "[i]t is Congress which has struck the balance in favor of preclearance to protect voting interest[s] over school district changes to improve the education process." *Ibid.*

ARGUMENT

Appellant asks this Court to decide whether a three-judge district court has jurisdiction over a declaratory judgment action brought by a State covered by Section 5 of the Voting Rights Act, 42 U.S.C. 1973c, solely for a determination whether a possible change in the governance of a local school

district would require judicial or administrative preclearance under Section 5. See J.S. i. The district court correctly concluded, however, that appellant's request for a declaratory judgment is not ripe for judicial review. Because that ripeness ruling is clearly correct and does not raise any substantial question warranting this Court's plenary consideration, the judgment of the district court should be summarily affirmed.

1. Chapter 39 of the Texas Education Code empowers the Texas Commissioner of Education to impose a number of sanctions on school districts, in ascending order of severity and intrusiveness. The Commissioner may, for example, issue a public notice of a school district's deficiency, order the preparation of a student achievement improvement plan by a school district, appoint an agency monitor to "participate in" the activities of a school board, appoint (as pertinent here) a master to "oversee" the operations of a district or a management team to "direct" the operations of a district, or appoint a board of managers to "exercise the powers" of the school board. See Tex. Educ. Code Ann. § 39.131(a) (West 1996). The available powers afford the Commissioner wide discretion in choosing a sanction appropriate to the degree of deficiency in any particular school board, and the Commissioner plainly has the authority to use a less intrusive sanction (such as appointing a monitor) before deploying a more drastic one (such as appointing a master or management team). It is not certain that the Commissioner will ever find it necessary to appoint a master or management team for any school district. In the event that a school district's deficiencies justify intervention under

Chapter 39, the exercise of less intrusive powers by the Commissioner may resolve the problems.

Because the State may never find it necessary to appoint a master to oversee the operations of a school board or to appoint a management team to direct those operations, the State's request for a declaratory ruling that such an appointment would not implicate Section 5 is not ripe for review, in the constitutional sense. See *Renne* v. *Geary*, 501 U.S. 312, 320-323 (1991). In effect, Texas has asked for an advisory opinion that, *if* the Commissioner decided at some point to appoint a master or management team, that appointment would not require preclearance under Section 5. But Texas has given no indication that the Commissioner intends imminently to appoint a master or management team to any particular school district. There is "no factual record of an actual or imminent application of [state sanctions] sufficient to present the [Section 5] issues in clean-cut and concrete form." *Id.* at 321-322 (internal quotation marks omitted).

Furthermore, the powers that the Commissioner may confer on masters and management teams under Section 39.131(a)(7) and (8) are subject to broad discretion on the part of the Commissioner. Those provisions allow appointment of a master to "oversee" the operations of a school district or a management team to "direct" such operations. While such appointments may well result in a change affecting voting if broad powers are conferred by the Commissioner, an appointment may also narrowly circumscribe the powers granted to the appointed officials. Thus, postponing consideration of the Section 5 issue "also has the advantage of permitting the state [authorities] further opportunity to construe" the pertinent

provisions of Chapter 39, giving greater clarity to the federal question of the application of Section 5 that would be presented by appointment of a master or management team. Cf. *Renne*, 501 U.S. at 323.

2. The district court also correctly concluded that prudential ripeness concerns counsel dismissal of appellant's declaratory judgment action. The prudential ripeness inquiry requires the courts to evaluate "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967). Both factors point to the conclusion that the claim raised by Texas, that Section 5 does not require preclearance of certain sanctions imposed on local school boards by the Commissioner, is not ripe for judicial resolution at this time.

First, the issue presented in this case cannot be characterized as a "purely legal one." *Abbott Laboratories*, 387 U.S. at 149. Rather, the application of Section 5 is likely to turn on the exact nature of the sanction imposed by the Commissioner. Under settled law, the appointment of a receiver for, or manager over, a local elected body "affect[s]" voting and thus implicates Section 5 if the appointment amounts to a "*de facto* replacement of [the] elect[ed] offici[als] with an appointive one." See *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 508 1992); *Allen* v. *State Board of Elections*, 393 U.S. 544, 550-551 (1969) (companion case of *Bunton* v. *Patterson*). The answer to the question whether Section 5 applies to the appointment of a master or management team by the Commissioner is likely to depend on the precise scope of the powers given to the master or management team. Indeed, the Commissioner is directed in every case to "clearly define the powers and duties of a master or

management team appointed to oversee the operations of the district," Tex. Educ. Code Ann. § 39.131(e) (West 1996), which suggests that those powers may not be the same in every case. For example, the master or management team may have largely advisory authority in some cases but in others may be able to overrule broadly the decisions of the local school board. The absence of facts regarding the powers of the person or body to be appointed under subsection (7) or (8) makes it impossible for a court to decide in advance whether such an appointment would implicate the preclearance requirement of Section 5.[3]

Second, appellant will not suffer hardship if judicial resolution of the question of the applicability of Section 5 is postponed until the Commissioner actually seeks to use one of the pertinent powers authorized under Chapter 39. If the Commissioner finds it necessary to appoint a master or management team for a school district, then, once the Commissioner has

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[3] Section 5 itself reflects a concern for ripeness. Section 5 applies when a jurisdiction either "enacts" or "seek[s] to administer" a voting change. When an authorizing statute vests discretion in a state official, the Attorney General may be able to preclear the "enact[ment]," but she cannot predict how the official having discretion will "seek to administer" that enactment. Section 5 does not authorize the Attorney General (or the district court) to give a jurisdiction *carte blanche* by assuming that specific actions that might be taken in the future pursuant to an authorizing statute, but which are not yet identified or described, will *not* affect voting, or will not have either discriminatory purpose or retrogressive effect. Cf. *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985) (separate preclearance required for change in qualifying period for an election though general underlying statute already precleared); *Clark* v. *Roemer*, 500 U.S. 646, 658 (1991) (changes to be precleared must be identified with specificity).

clearly defined the powers of that person or body—as required by Section 39.131(e)—the State can present the appointment plan to the Department of Justice for preclearance with a request for expedited consideration. And if the Department of Justice refuses preclearance on the grounds that the appointment effects a change with respect to voting and has a retrogressive effect, the State will be able to request a declaratory judgment from the District Court for the District of Columbia in a concrete factual context.[4]

3. Finally, the district court correctly declined to address appellant's argument that the sanctions in question need not be precleared because they are consistent with federal law requiring recipients of federal financial assistance to have in place methods to impose sanctions on recipient school districts that

[4] As the district court noted in this case (J.S. App. 4a), it is not clear that Section 5 provides jurisdiction over a declaratory judgment suit brought by a covered jurisdiction *solely* to determine whether a change in the law affects voting, such that Section 5 applies. It is clear, however, that in other contexts a three-judge district court has authority to make the determination whether Section 5 applies. The issue of the applicability of Section 5 has been resolved in cases in which the covered jurisdiction has sought a declaratory judgment that the new practice does not have a discriminatory purpose or effect, see *Texas* v. *United States*, 866 F. Supp. 20 (D.D.C. 1994), or when the United States or an individual has sued to enjoin enforcement of a new voting practice because it has not been precleared, see *Presley*, *supra*. Those avenues of review either are expressly authorized by the Voting Rights Act itself or have been judicially found to be implied by the Act as necessary to promote its purposes. See 42 U.S.C. 1973c (authorizing preclearance suits by covered jurisdictions); 42 U.S.C. 1973j(d) (civil actions by Attorney General); *Allen*, 393 U.S. at 553-557 (recognizing implied private right of action to challenge unprecleared changes).

fail to show improved performance, and providing those recipients with flexibility in choosing their sanctions. See J.S. 17-21. That argument goes to the merits of the coverage of Section 5, but a ripe controversy is necessary for the courts to resolve that question, and appellant's request for a declaratory judgment is not ripe, for the reasons we have explained. The Texas Education Commissioner has demonstrated no concrete plan to appoint a master or management team for any particular school district.

Appellant's reliance on those federal statutes is ultimately unavailing on the merits anyway. The state statutes here at issue—as well as any specific use of the sanctions they authorize—represent the State's policy choice of the means of implementing the federal program. Changes in state law enacted to conform to federal requirements are not exempt from preclearance under Section 5 as long as those changes reflect to any degree the policy choice of the State. See *Young* v. *Fordice*, 117 S. Ct. 1228, 1235-1236 (1997); *Allen*, 393 U.S. at 565 n.29, 566-569.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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AUGUST 1997

(4)

No. 97-29

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

STATE OF TEXAS, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

JURISDICTIONAL STATEMENT FILED JUNE 23, 1997
PROBABLE JURISDICTION NOTED SEPTEMBER 29, 1997

(COUNSEL LISTED ON INSIDE COVER)
NOVEMBER 1997

51 pp

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Docket Sheet

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

STATE OF TEXAS, Plaintiff,	•	
	•	Civil Action
v.	•	No. 96-1274 (GK)
UNITED STATES OF AMERICA, Defendant.	•	

6/7/76	1	COMPLAINT filed by plaintiff STATE OF TEXAS (dam) [Entry date 06/17/96]
6/7/96	2	APPLICATION by plaintiff STATE OF TEXAS for a Three Judge Court (dam) [Entry date 06/17/96]
6/17/96	3	ORDER by Judge Gladys Kessler: to show cause by 4:00 p.m. on 6/28/96 as to whether this casue is cognizable in this Court and whether the undersigned Judge should request the convening of a Three-Judge District Court (N) (pob)
6/28/96	4	MOTION filed by federal defendant USA to extend time to 7/10/96 to respond to Order to show; attachments (1) (dam) [Entry date 07/01/96]
7/1/96	5	ORDER by Judge Gladys Kessler: granting motion to extend time to 7/10/96 to respond to Order to show [4-1] by USA (N) (pob)

7/10/96 6 RESPONSE by federal defendant USA to order to show cause by 4:00 p.m. on 6/28/96 as to whether this cause is cognizable in this Court and whether the undersigned Judge should request the convening of a Three-Judge District Court [3-1], order [3-2]; attachments (1) (dam) [Entry date 07/11/96]

7/15/96 7 ORDER by Judge Gladys Kessler: granting motion for a Three Judge Court [2-1] by STATE OF TEXAS; directing the Clerk to forward a copy of this Order to the Chief Judge of the U.S. Court of Appeals for the District of Columbia. (N) (pob) [Entry date 07/16/96]

7/22/96 8 REPLY by plaintiff STATE OF TEXAS to response to order to show cause by 4:00 p.m. on 6/28/96 as to whether this cause is cognizable in this Court and whether the undersigned Judge should request the convening of a Three-Judge District Court [3-1]. (dam) [Entry date 07/23/96]

7/24/96 9 CERTIFIED COPY of Order by Chief Judge Harry T. Edwards, filed in USCA on 7/22/96, directing pursuant to 28 USC 2284(b)(1), that Circuit Judge Judith W. Rogers and District Judge Aubrey E. Robinson are hereby designated to serve with District Judge Gladys Kessler to hear and determine this cause. (gt) [Entry date 07/25/96]

7/24/96 -- CASE ASSIGNED to Three Judge Panel consisting of: District Judge Gladys Kessler, Circuit Judge Judith W. Rogers and District

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8/9/96 11 ANSWER TO COMPLAINT [1-1] by federal defendant USA. (dam) [Entry date 8/12/96]

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09/23/96 13 MOTION filed by federal defendant USA to dismiss complaint [1-1], or, in the alternative for judgment on the pleadings; attachments (1) (dam) [Entry date 09/24/96]

10/3/96 14 MOTION filed by federal defendant USA to strike motion for summary judgment [12-1]; attachment (1). (tth) [Entry date 10/04/96]

10/11/96 15 RESPONSE by plaintiff STATE OF TEXAS in opposition to motion to strike motion for summary judgment [12-1] [14-1] by USA. (dam) [Entry date 10/15/96]

10/21/96 16 RESPONSE by federal defendant USA in opposition to motion for summary judgment [12-1] by STATE OF TEXAS. (jmf) [Entry date 10/22/96]

10/21/96 17 RESPONSE by plaintiff STATE OF TEXAS to

		motion to dismiss complaint [1-1] [13-1] by USA (dam) [Entry date 10/22/96]
11/5/96	18	REPLY by federal defendant USA to response to motion to dismiss complaint [1-1] [13-1] by USA; attachments (2). (tth) [Entry date 11/06/96]
3/5/97	19	MEMORANDUM OPINION by Circuit Judge Rogers, Judge Kessler, Judge A. Robinson signed by Judge Gladys Kessler (N) (pob) [Entry date 03/06/97]
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3/17/97	22	AMENDED ORDER by Judge Gladys Kessler: denying motion to strike motion for summary judgment [12-1] [14-1] by USA, granting motion to dismiss complaint [1-1] [13-1] by USA, denying motion for judgment on the pleadings [13-2] by USA, denying motion for summary judgment [12-1] by STATE OF TEXAS (N) (pob) [Entry date 03/19/97] [Edit date 03/19/97]

4/23/97	23	NOTICE OF APPEAL by plaintiff STATE OF TEXAS to the U.S. Supreme Court from order [20-1], entered on: 3/6/97; NO FEE PAID. (tth) [Entry date 04/24/97]
4/30/97	--	US Supreme Court appeal filling fee of $5.00 paid [23-1] by STATE OF TEXAS, by plaintiff STATE OF TEXAS. USCA notified. (tth) [Entry date 05/01/97]
5/12/97	24	SUPPLEMENT by plaintiff STATE OF TEXAS to notice of appeal [23-1] by STATE OF TEXAS (tth) [Entry date 05/13/97]
7/7/97	--	US Supreme Court #97-29 assigned for appeal [23-1] by STATE OF TEXAS (tth) [Entry date 07/09/97]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed June 7, 1996

STATE OF TEXAS, Plaintiff,	*	CASE NUMBER 1:96CV01274
	*	JUDGE: Gladys Kessler
v.	*	
	*	DECK TYPE: Three Judge Court
UNITED STATES OF AMERICA, Defendant.	*	DATE STAMP: 06/07/96

ORIGINAL COMPLAINT

The State of Texas ("Texas") files this action pursuant to the Voting Rights Act, 42 U.S.C. § 1973c, seeking a declaratory judgment with respect to Chapter 39.131 of the Texas Education Code. Specifically, Texas seeks a declaratory judgment that the temporary placement of a master or management team under § 39.131(a)(7) and (8) need not be precleared because it is not a change affecting voting, and, therefore, that the Voting Rights Act does not apply to these provisions. In support of this action, Texas shows the Court as follows:

JURISDICTION AND PARTIES

1. This action arises under section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, which, when applicable, prevents implementation of state electoral law changes until the preclearance precondition is satisfied administratively or judicially.

2. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 1973c. Venue is proper under 42 U.S.C. § 1973c.

3. Plaintiff, The State of Texas, is a jurisdiction covered by section 5 of the Voting Rights Act, 42 U.S.C. § 1973c. See 28 C.F.R. Part 51, App. (1993).

4. Defendant, The United States of America, is the national sovereign and has substantial responsibilities under section 5 of the Voting Rights Act. Texas has served the United States pursuant to Fed. R. Civ. P. 4(i), by sending a copy of the summons and complaint by certified mail addressed to the civil process clerk at the office of the United States attorney for the District of Columbia and to the Attorney General of the United States at Washington, District of Columbia.

THREE JUDGE PANEL REQUESTED

5. Texas requests that a three-judge Court be convened pursuant to 28 U.S.C. § 2284 and 42 U.S.C. § 1973c.

FACTUAL ALLEGATIONS

6. Texas, like all States, has a substantial interest in the education of its children. Recognizing that "[a] general diffusion of knowledge [is] essential to the preservation of the liberties and rights of the people," Texas has made it "the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." TEX. CONST. Art. VII, § 1. Article VII, § 3 of the Texas Constitution provides in part that "the Legislature may also provide for the formation of school district[s] by general laws." The Texas Supreme Court has held that this constitutional provision gives "the Legislature a free hand establishing independent school districts including the abolition and consolidation of districts." *Carrollton-Farmers Branch Independent School District v. Edgewood Independent School District*, 826 S.W.2d 489, 511 (Tex. 1992) (internal quotations omitted), *modified*, 893 S.W.2d 468 (Tex. 1995).

Moreover, the Texas Legislature has enacted an accountability system which holds local school districts responsible for academic performance levels and for compliance with state laws and effective governance procedures. This accountability system provides the State with important controls that ensure that school districts, superintendents, and campuses provide the best education possible to Texas children.

7. Chapter 39 of the Texas Education Code, enacted in 1995, contains Texas' assessment and accountability system, which holds school districts accountable for student performance. The Commissioner of Education is authorized to impose sanctions upon a district based upon a lowered or unimproved accreditation rating where an annual review of academic performance reveals unacceptable performance by a subgroup for which data is disaggregated as to race, ethnicity, sex, or socioeconomic status under § 39.051(b) (§ 39.073). In other words, students are tested by a state administered exam and school districts are rated according to the performance of students in that district on the exam. The exam results are disaggregated by the ethnicity of students in the district and the district is held accountable for the performance of each group. For example, a school district in which a high proportion of African-American students failed the math portion of the exam is designated as low-performing based solely on the performance of this group of students. This system ensures that the school district and the state focus on means of increasing the performance of all student groups. This procedure has resulted in increased performance by all student groups statewide.

8. In addition, the Commissioner is also authorized to impose sanctions upon a district where (1) an investigation discloses violations of federal law or regulations regarding federally-required or funded programs (§ 39.074); or (2) an investigation discloses a violation of the state's accountability system, required accounting and financial practices, excessive alternative placements, violation of civil rights or other federally-imposed requirements, or of the legally-established

roles of superintendent and board of trustees (§ 39.075).

9. Section 39.131 of the Texas Education Code authorizes the Commissioner of Education to impose sanctions on a school district "to the extent the Commissioner determines necessary." TEX. EDUC. CODE § 39.131(a). This flexibility allows the Commissioner to deal quickly and effectively with problems that jeopardize the education of Texas children in a particular district.

10. The options available to the Commissioner in order to insure compliance by the school districts with state educational objectives increase in severity. They include: (1) issuance of a public notice of the deficiency to the board of trustees; (2) ordering a hearing conducted by the board of trustees of the district to notify the public of the unacceptable performance, the improvements in performance expected by the agency, and the sanctions that may be imposed if the performance does not improve; (3) ordering the preparation of a student achievement improvement plan that addresses each academic excellence indicator for which the district's performance is unacceptable, submission of the plan to the Commissioner for approval, and implementation of the plan; (4) ordering a hearing to be held before the Commissioner or his designee at which the president of the board of trustees and the superintendent of the district shall appear and explain the district' s low performance, lack of improvement, and plans for improvement; (5) arranging an on-site investigation of the district; and, (6) appointing an agency monitor to participate in and report to the agency on the activities of the board of trustees or superintendent. TEX. EDUC. CODE §§ 39.131 (a)(1)-(6).

11. Other sanctions available to the Commissioner include: (7) appointing a master to oversee the district's operations; (8) appointing a management team to direct the operations of the district in areas of unacceptable performance or requiring the district to obtain certain services under contract with another person; (9) appointing a board of managers

composed of residents of the district to exercise the powers and duties of the board of trustees if a district has been rated academically unacceptable for a period of one year or more; and (10) annexing the district to one or more adjoining districts, or requesting the Board of Education to revoke a district's home-rule school district charter, if a district has been rated as academically unacceptable for a period of two years or more. TEX. EDUC. CODE § 39.131(a)(7)-(10). Sanctions (9) and (10) are not in issue in this action.

12. Agency policy requires first the imposition of sanctions which do not include the appointment of a master or management team. Most interventions begin and end with a required improvement plan, a hearing, or the presence of a monitor. The Commissioner is required under § 39.131(c) to review annually the performance of districts subject to sanctions based upon academic performance, and to increase the level of sanction in the absence of improvement unless the Commissioner finds good cause for not doing so. The appointment of a master or management team pursuant to § 39.131(a)(7) and (8) provides the Commissioner with necessary options to deal with serious problems which threaten the educational process in a district.

13. When the Commissioner appoints a master or management team to oversee the operations of a school district, the Commissioner must clearly define their powers and duties. TEX. EDUC. CODE § 39.131(e). State law defines the limited powers of the master or management team. A master or management team may: (1) direct an action to be taken by the principal of a campus, the district superintendent, or the district's board of trustees; and (2) approve or disapprove any action of the campus principal, the district superintendent, or the district's board of trustees. TEX. EDUC. CODE § 39.131(e)(1), (2). State law prohibits a master or management team from taking any action concerning a district election, including ordering or canceling an election or altering the date of, or the polling places for, an election; changing the number

of or method of selecting the board of trustees; setting a tax rate for the district; and adopting a budget for the district that provides for spending a different amount, exclusive of required debt service, from that previously adopted by the board of trustees. TEX. EDUC. CODE § 39.131(e)(3)-(6).

14. In addition, a master or management team serves for a limited period of time. Under § 39.131(e), the Commissioner must evaluate the continued need for the master or management team every 90 days. Unless that evaluation indicates that continued appointment is necessary for effective governance of the district or delivery of instructional services, the master or management team must be removed. *Id.* Moreover, the elected board of trustees is not displaced during the time the master or management team is in place. A portion of their responsibilities is allocated to the master or management team for a limited period of time until the deficiency is corrected. Finally, a party that disagrees with the Commissioner's actions, including a change in a district's accreditation status or the imposition of sanctions on a district, has a right to appeal the evaluation to the district court of Travis County. TEX. EDUC. CODE § 7.057(d).

15. Moreover, the provisions permitting the appointment of a master or management team are consistent with federal law, which requires Texas to maintain an educational system that includes a system of assessment and accountability. The "Improving America's Schools Act," 20 U.S.C. §§ 6301 *et seq.*, requires state oversight of educational agencies which receive federal funding to ensure that adequate progress is made towards meeting the state's student performance standards. The Act also requires the state to take corrective action against schools that fail to make adequate progress after four years of low performance.

16. The federal legislation provides for interventions similar to those in Chapter 39 of the Texas Education Code. These include removing particular schools from the jurisdiction of the local educational agency and establishing alterative arrangements for public governance and supervision of such

schools; appointment by the state educational agency of a receiver or trustee to administer the affairs of the local educational agency in place of the superintendent and school board; and the abolition or restructuring of the local educational agency. 20 U.S.C. § 6317(d)(6)(B)(i)(III), (V), (VI).

17. Moreover, Texas has been selected as an "Ed-Flex Partnership State" under the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891(e) ("Ed-Flex"), one of only six states to be selected. Under Ed-Flex, the state is granted authority normally reserved to the Secretary of Education. This delegation of authority includes the ability to waive the accountability provisions of Title I of the Elementary and Secondary Education Act, (20 U.S.C. §§ 6301 *et seq.*), as amended by the Improving America's Schools Act of 1994, and to conform them with state law counterparts. 20 U.S.C. § 5891(b)(1). Title I includes the accountability provisions of 20 U.S.C. § 6317(d).

18. The Texas Ed-Flex application included provisions under which the Texas Commissioner of Education would appoint a committee to review waiver requests from school districts and make recommendations for statewide waivers. The first statewide waiver approved by the committee allows the state to utilize federal accountability provisions in a manner consistent with Chapter 39 of the Texas Education Code. In other words, the sanctions enumerated in Chapter 39.131 of the Texas Education Code are authorized by the federal statute. Because action taken under authority of federal law does not require preclearance by the federal government, the adoption of the Ed-Flex waiver would also allow Texas to take action under Chapter 39.131 without preclearance.

PRIOR PRECLEARANCE HISTORY

19. After passage of Senate Bill 1, of which Chapter 39 of the Texas Education Code was a part, Texas submitted portions of S.B. 1 to the United States Department of Justice

("DOJ") for administrative preclearance under section 5 of the Voting Rights Act. Texas submitted the sanctions provisions of § 39.131 under protest because it did not believe them to be election-related changes. However, DOJ disagreed. Although the DOJ correctly determined that the sanctions under § 39.131(a)(1)-(6) are not voting changes subject to preclearance under § 5 of the Voting Rights Act, it concluded that Texas must obtain preclearance in each instance that it appoints a master or a management team to a school district under § 39.131(a)(7) and (8).

REQUEST FOR DECLARATORY JUDGMENT

20. Texas seeks a ruling from this Court that the provisions of Chapter 39 of the Texas Education Code pertaining to appointment of a master and/or a management team are not subject to the preclearance requirement of Section 5 of the Voting Rights Act. Sections 39.13 l(a)(7) and (8) do not constitute a voting qualification or prerequisite to voting, or a standard, practice or procedure with respect to voting. Rather, these provisions, like §§ 39.131(a)(1)-(6) are a change in the distribution of power among officials which has no direct relation to, or impact, on voting.

21. The power held by the oversight authorities, i.e., the master or management team, is limited in scope and time until the school district or campus begins to operate at an acceptable level of performance. There is no replacement of the elected board of trustees.

22. In addition, because Texas is an Ed-Flex Partnership State, it is authorized to conform federal authority to impose sanctions under 20 U.S.C. §6317(d) with the provisions of Texas Education Code § 39.131. Consequently, action taken under authority of 20 U.S.C. § 6317(d), as modified pursuant to Ed-Flex, 20 U.S.C. § 5891(e), does not require preclearance under the Voting Rights Act.

REQUEST FOR RELIEF

WHEREFORE, the State of Texas asks this Court to:

a. Assert jurisdiction in this matter and request the convening of a three-judge Court;

b. Issue a declaratory judgment that the preclearance provisions of Section 5 of the Voting Rights Act do not apply to §§ 39.131(a)(7) and (8) of the Texas Education Code because they are not a change affecting voting;

c. Alternatively, issue a declaratory judgment that the preclearance provisions of section 5 of the Voting Rights Act do not apply to actions taken pursuant to 20 U.S.C. § 5891(e) to conform with TEX. EDUC. CODE § 39.131; and

d. Grant such other and further relief as is deemed just and proper.

Respectfully submitted,

DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

/s/
JAVIER AGUILAR
Special Assistant Attorney General

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ATTORNEYS FOR STATE OF TEXAS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Filed August 9, 1996

STATE OF TEXAS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action
	)	No. 96-1274 (JWR AER GK)
UNITED STATES	)	
OF AMERICA,	)	
	)	
Defendant.	)	

ANSWER

1. Admit.
2. Admit.
3. Admit.
4. Admit.
5. The United States does not oppose this matter being heard by a three-judge court.
6. The United States admits that Texas has a substantial interest in the education of its children. The United States admits that the referenced materials are accurately quoted in relevant part. The United States lacks sufficient knowledge or information to admit or deny the remainder of the allegations contained in Paragraph 6.
7. The United States admits that Chapter 39 of the Texas Education Code authorizes the Texas Commissioner of Education to impose sanctions upon a school district on the basis of certain testing and accreditation criteria. The United States lacks sufficient knowledge or information to admit or deny the remainder of the allegations contained in Paragraph 7.
8. Admit.

9. The United States admits that Chapter 39 of the Texas Education Code authorizes the Texas Commissioner of Education to impose sanctions upon a school district "to the extent the commissioner determines necessary." The United States lacks sufficient knowledge or information to admit or deny the remainder of the allegations contained in Paragraph 9.

10. The United States lacks sufficient knowledge or information to admit or deny whether the sanctions cited in Paragraph 10 are increasing in severity. The remainder of the allegations contained in Paragraph 10 are admitted.

11. Admit.

12. The United States admits that Chapter 39 of the Texas Education Code requires annual review of school districts' academic performance and authorizes the Texas Commissioner of Education to impose sanctions based upon academic performance. The United States lacks sufficient knowledge or information to admit or deny the remainder of the allegations contained in Paragraph 12.

13. The United States admits the first, third and fourth sentences. The second sentence is denied to the extent that it alleges the Commissioner of Education to have no discretion in defining the powers of masters and management teams.

14. The United States admits the second and third sentences to the extent that they allege that Chapter 39 provides for periodic renewal of master and management team appointments. The United States denies that a master or management team appointed under Chapter 39 necessarily will serve for a limited period of time. The remainder of the allegations in Paragraph 14 are denied to the extent that they allege that no replacement of elected school board members by masters or management teams might occur pursuant to Chapter 39.

15. The United States lacks sufficient knowledge or information to admit or deny the allegation that "the provisions permitting the appointment of a master or management team are

consistent with federal law". The remainder of the allegations contained in Paragraph 15 are admitted.

16. The United States admits the allegations in the first sentence to the extent that 20 U.S.C. §§ 6301 et seq. provides for optional, discretionary actions by state officials that are similar to some of those established by Chapter 39. The United States denies the allegations in the first sentence to the extent that they allege the federal legislation to require any particular action by state officials. The second and third sentences contained in Paragraph 16 are admitted.

17. The United States lacks sufficient knowledge or information to admit or deny the allegations contained in the first, second and third sentences as they pertain to Texas. The fourth sentence contained in Paragraph 17 is admitted.

18. The United States lacks sufficient knowledge or information to admit or deny the allegations contained in the first, second and third sentences. The remainder of the allegations contained in Paragraph 18 are denied.

19. The United States admits the first and third sentences. The remainder of the allegations in Paragraph 19 are denied.

20. The United States admits that Texas seeks a ruling from this Court that appointments of masters and management teams pursuant to Chapter 39 are not subject to Section 5 preclearance. The remainder of the allegations contained in Paragraph 20 are denied to the extent that they allege that no replacement of elected school board members by masters or management teams might occur pursuant to Chapter 39.

21. The allegations in Paragraph 21 are denied to the extent that they allege that no replacement of elected school board members by masters or management teams might occur pursuant to Chapter 39, or that a master or management team appointed under Chapter 39 necessarily will serve for a limited period of time.

22. Denied.

Prayer for Relief

Subsections b), c) and d) of the prayer for relief are denied insofar as they allege that Texas is entitled to relief on the basis of the claims stated in the complaint.

First Affirmative Defense

The Court lacks jurisdiction because the plaintiff's claims are not ripe for judicial review.

/s/

ERIC H. HOLDER, JR.
United States Attorney

DEVAL L. PATRICK
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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of August, 1996, I served or caused to served by telefacsimile and by overnight delivery a copy of the United States' Answer upon the following persons:

Javier Aguilar, Esq.
Special Assistant Attorney General
P. O. Box 12548, Capitol Station
Austin, Texas 78711-2548

/s/

Robert A. Kengle
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(202) 514-6196

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
Filed May 11, 1995

JIMMIE CASIAS, SANTIAGO PACHECO, and MARY OCHOA,	)	
Plaintiffs,	)	
VS.	)	CIVIL ACTION
	)	NO. SA-95-CA-0221
MICHAEL MOSES, Texas Commissioner of Education; TEXAS EDUCATION AGENCY; TEXAS STATE BOARD OF EDUCATION; and STATE OF TEXAS;	)	
Defendants.	)	

Before FORTUNATO P. BENAVIDES, Circuit Judges, and ORLANDO L. GARCIA and EDWARD C. PRADO, District Judges.[1]

ORDER ON PRELIMINARY INJUNCTION

On this date came on to be considered the Plaintiffs'

[1] Plaintiffs properly requested a three-judge panel pursuant to 42 U.S.C. § 1973c. *Allen v. State Board of Elections*, 393 U.S. 544, 563, 89 S.Ct. 817, 830, 22 L.Ed.2d 1 (1969). The panel was designated by Henry A. Politz, Chief Judge, United States Court of Appeals for the Fifth Circuit.

Motion for Preliminary Injunction, filed March 13, 1995.[2] After careful review of the various pleadings and responses[3] filed with the Court, and hearing the evidence and arguments presented by the parties, the Court finds that the motion should be granted.

This case arises under § 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. Section 5 governs changes in election or voting procedures that may have the purpose or effect of discriminating against minority voters, and requires covered jurisdictions, such as Texas, to obtain preclearance of new statutes which impact on voting practices or procedures. *Id.* Preclearance may be obtained through two different methods:

> Through judicial preclearance, a covered jurisdiction may obtain from the United States District Court for the District of Columbia a declaratory judgment that the voting change 'does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.' (citation omitted) Through administrative preclearance, the jurisdiction may submit the change to the Attorney General of the United States. If the Attorney General 'has not

[2] Plaintiffs' Motion for Temporary Restraining Order filed contemporaneously with the Motion for Preliminary Injunction was denied on March 15, 1995.

[3] The Court has also taken notice of and considered the pleadings and arguments presented in the companion case styled *United States of America v. Michael Moses, Texas Commissioner of Education; et al*, Cause No. SA-95-CA-0275, also filed in the United States District Court, Western District of Texas, San Antonio Division.

> interposed an objection within sixty days after such submission, ' the State may enforce the change.

Clark v. Roemer, 500 U.S. 646, 648-49, 111 S.Ct. 2096, 2099, 114 L.Ed.2d 691 (1991).

Plaintiffs are eligible Hispanic voters residing in the Somerset Independent School District, Bexar County, Texas ("Somerset I.S.D."). They seek to enjoin the Defendants, the State of Texas and various Texas state education officials and agencies, from appointing a management team to oversee and direct the operation of the Board of Trustees of the Somerset I.S.D. ("the Board"). Plaintiffs allege that the statute which allows the appointment of such a management team, Chapter 35 of the Texas Education Code, "Public School System Accountability," is a change affecting voting that is subject to the preclearance requirements of § 5 of the Voting Rights Act. Plaintiffs maintain that Chapter 35 was never precleared and thus is legally invalid and unenforceable. Defendants assert that neither the enactment of Chapter 35 nor the appointment of a management team pursuant to that provision falls within the purview of § 5 because neither action is "a change affecting voting."

Background

In 1993, the Texas legislature adopted the relevant Chapter 35 of the Texas Education Code, "Public School System Accountability,"as part of Senate Bill 7, 73rd Leg., Reg. Sess.[4] Chapter 35 sets performance standards for school

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[4] The Court takes notice that there are now *three* Chapter 35s, all enacted in 1993. The Chapter 35 at issue, Tex. Educ. Code §§ 35.001-35.121, is located between the other two Chapter 35s ("Advanced Placement Incentives" and "Texas Partnership and Scholarship Program"), beginning on page 134 of Vernon's Texas Codes Annotated, volume 2 Education Code (1995 Supp.)

districts and provides for remedial measures that can be implemented by the state where a district is not meeting minimum standards and may be in jeopardy of losing accreditation. Among other things, the Commissioner of Education may "appoint a management team to direct the operations of the district in areas of unacceptable performance." Tex. Educ. Code § 35-121(a)(8). A management team appointed to oversee operations of a district may:

> (1) direct an action to be taken by the principal of a campus, the superintendent of the district, or the board of trustees of the district; or
>
> (2) approve or disapprove any action of the principal of a campus, the superintendent of the district, or the board of trustees of the district.

Tex. Educ. Code § 35.121(e).

In 1994, the Texas Education Agency ("TEA") began receiving reports of escalating tension and animosity between the community of Somerset, the school administration, and members of the Board of Trustees.[5] There were serious conflicts in the community and on the Board over at-large

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[5] This was not the first time that TEA had concern about the administration of Somerset I.S.D. In 1991, a monitor was appointed to oversee the district's deficient instructional program, however, the monitor had been withdrawn prior to the events that culminated in this lawsuit.

versus single member district election of Board members, and over the performance and political involvement of the school superintendent. After investigation by the staff of the Governance Operations Division in the Office of Accountability of the TEA, the Commissioner of Education concluded that a volatile and potentially violent situation existed that threatened the day-to-day operations of the district and was likely to "spill over into the schools impacting the learning environment and endangering student and staff safety." By letter dated February 21, 1995, the Commissioner announced the appointment of a management team "to oversee the operations of Somerset ISD and to guide the district in restoring stability to its governance operations." The February 21 letter also outlined the team's authority:

> The Management Team will have the authority to approve or disapprove any action of the board of trustees and of the administration . . .
>
> Duties of the Management Team will include but not be limited to:
>
> * having authority to approve or disapprove the convening of all board meetings
>
> * guiding the district in its policy and administrative decision-making process ...
>
> * ensuring the conduct of all board meetings is in accordance with state law and policy, appropriate parliamentary procedures, and good conduct . . .

Since its appointment, the management team has exercised its power to approve and/or convene meetings of the Board, and has vetoed or threatened to veto certain Board actions. Neither

TEA nor the Commissioner has given any indication of how long the management team may be in place.

Analysis

The issue before the Court at this time is whether a preliminary injunction should issue to preclude Defendants from taking any action under Chapter 35 until the Court has determined if that legislation requires preclearance pursuant to § 5 of the Voting Rights Act. Four prerequisites must be met before a party is entitled to preliminary injunctive relief:

(1) a substantial likelihood that plaintiff will prevail on the merits,

(2) a substantial threat that irreparable injury will result if the injunction is not granted,

(3) a determination that the threatened injury outweighs the threatened harm to the defendant, and;

(4) that granting the preliminary injunction will not disserve the public interest.

Enterprise Int'l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana, 762 F.2d 464, 471 (5th Cir. 1985). Among the four prerequisites, the finding of irreparable harm is central and preeminent. *Canal Authority of the State of Fla. v. Callaway*, 489 F.2d 567, 573 (5th Cir. 1974). However, because of the nature of dispute in this case, a finding that Plaintiffs are likely to prevail on the merits weighs heavily toward finding that irreparable harm will result if an injunction is not granted.

The United States Supreme Court has held that if voting changes subject to § 5 are not precleared, plaintiffs objecting to those changes are entitled to an injunction prohibiting the state

from implementing the changes. *Clark*, 500 U.S. at 652-53, 111 S.Ct. at 2101; *Allen v. State Board of Elections*, 393 U.S. 544, 572, 89 S.Ct. 817, 835, 22 L.Ed.2d 1 (1969). Section 5 is a congressional response to "the unremitting efforts by some state and local officials to frustrate their citizens' equal enjoyment of the right to vote." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 501, 112 S.Ct. 820, 827, 117 L.Ed. 2d 51 (1992). "Congress intended [§ 5] to reach any state enactment which altered the election law of a covered State in even a minor way." *Presley*, 502 U.S. at 501, 112 S.Ct. at 827-28. Section 5 itself provides that an action to enjoin enforcement of changes affecting voting may be brought even if the Attorney General has failed to make an objection or has indicated that no objection will be made to the change, or when a declaratory judgment has been entered. Thus it is clear that § 5 was intended to prevent the inevitable harm that accrues not only when citizens are deprived of their voting rights but the harm that may occur when the historically slow pace of justice allows such a deprivation to continue unabated pending, a final determination. The Court finds that if the Plaintiffs are likely to succeed on the merits then a substantial threat of irreparable harm to the Plaintiffs' voting rights has been established.

Defendants' primary argument is that Chapter 35 is not a change affecting voting subject to preclearance under § 5.[6]

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[6] There does not appear to be any real disagreement that Chapter 35 has not been precleared. Although Senate Bill 7, in which Chapter 35 is included, was submitted to the Attorney General for review, Chapter 35 was not one of the portions of the bill identified as being a potential change affecting voting. Defendants conceded during the evidentiary hearing on the preliminary injunction that the submission of the entire bill without calling specific attention to Chapter 35 was probably insufficient to meet the preclearance requirements of § 5. *See Clark*, 501 U.S. at 656-58 and n. 26 & 28, 111 S.Ct.

This contention is based chiefly on the case of *Presley v. Etowah County Comm'n*, 502 U.S. 491, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992). Plaintiffs urge that the case at bar involves the *de facto* replacement of an elected board with an appointed team, an issue the *Presley* Court expressly did not reach. *Presley*, 502 U.S. at 508, 112 S.Ct. at 831. Based on the pleadings and evidence to date, the Court is inclined to agree with Plaintiffs that *Presley* may not be controlling in this case.

Presley dealt with two fact situations, both of which involved the redistribution of certain powers among elected and appointed officials. In contrast, Chapter 35 of the Texas Education Code gives the State broad authority to appoint a management team that can completely usurp the function of the Somerset I.S.D. Board of Trustees. In fact, the Commissioner's letter appointing the management team in this instance specifically notes that the team may veto any, and we presume all, of the actions of the Board. The Supreme Court has stated that the replacement of an elected office with an appointed one is a change subject to preclearance under § 5. *Allen*, 393 U.S. at 569-70, 89 S.Ct. at 833-34. The Supreme Court also recognized that there might be circumstances in which "an otherwise uncovered enactment . . . might . . . rise to the level of a *de facto* replacement of an elective office with an appointive one, within the rule of *Bunton v. Patterson*."[7]

103-04; *McCain v. Lybrand*, 465 U.S. 236, 256-57, 104 S.Ct. 1037, 1049, 79 L.Ed.2d 271 (1984). Defendants will have the opportunity to brief this issue in more detail if they wish prior to the Court's final ruling on declaratory judgment.

[7] *Bunton v. Patterson* is the case decided in *Allen*, 393 U.S. at 550-51, 567-70, 89 S.Ct. at 823-24, 833-34, which involved the replacement of an elected office with an appointed one.

Presley, 502 U.S. at 508, 112 S.Ct. at 831. Because of the broad authority given to the management team,[8] it appears that the changes contemplated by Chapter 35, as a practical matter, could result in the replacement of the elected Board with the appointed management team.[9] It is Plaintiffs' position that this type of action is a change requiring preclearance under § 5 and it appears likely at this time that Plaintiffs will prevail on the merits of the declaratory judgment.

Finally, the Court must consider whether the threatened injury outweighs the threatened harm to the defendant and whether an injunction would disserve the public interest. If the State of Texas is prohibited from acting pursuant to Chapter 35, the hostilities at the Board meetings may well continue and could conceivably affect the educational welfare of the students in the Somerset I.S.D. But it would seem that such hostilities might be better addressed through local and state law enforcement agencies instead of a takeover of the rights of the

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[8] Pursuant to the Chapter 35 provision in question, it appears that the management team has absolute control over the business before the elected school board. The management team can approve or disapprove the agenda for any meeting of the school board and has the right to determine the outcome of any matter that the team allows the school board members to consider.

[9] The fact that the team may not exercise all of the power entrusted to it is not relevant in the determination of whether Chapter 35 is a change affecting voting. It is the scope of the enactment on its face that must be considered. *See State of Texas v. U.S.*, 866 F.Supp. 20, 26 (D.C.Cir. 1994)(considering whether the legislative scheme replaces the existing body).

elected school board members. In any event, the citizens of Somerset risk being deprived of their constitutional right to vote if the management team stays. If Chapter 35 is subject to preclearance, Plaintiffs would be entitled to an injunction as a matter of law without any further showing of irreparable harm or balancing of interests. *Clark*, 500 U.S. at 652-52, 111 S.Ct. at 2101; *Government of the Virgin Islands, Dept. of Conservation v. Virgin Islands Paving, Inc.*, 714 F. 2d 283, 286 (3rd Cir. 1983). In this case, the Congressional intent is clear that voting rights take precedence over other state interests. Prevention of even a threat of discrimination in voting is the entire purpose behind § 5. Therefore, the Court finds that a preliminary injunction will serve the public interest in voting which, in this case, outweighs the State's concern that community conflict may have a negative impact on the smooth functioning of the school district.

Because the parties came before the Court initially on the matter of the preliminary injunction, all parties may not have had the opportunity to fully brief the issues regarding Plaintiffs, requested declaratory judgment on preclearance. For that reason and because the court intends to consolidate this case with the companion case brought by the Department of Justice,[10] the Court will grant the motion for preliminary injunction at this time and reserve a final determination on the merits until the parties have had an opportunity to fully present their views.

Accordingly, it is hereby ORDERED that the Motion for Preliminary Injunction is GRANTED. Defendants Michael Moses as the Commissioner of Education, the Texas Education Agency, the Texas State Board of Education and the State of

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[10] All parties agreed at the evidentiary hearing that this case should be consolidated with Cause No. SA-95-CA-O275, styled *United States of America v. Michael Moses, Texas Commissioner of Education, et al.*

Texas, along with their agents, officers, representatives, successors, employees, and those acting in concert with them, shall refrain from implementing any action with respect to Somerset I.S.D. or the Somerset Board of Trustees pursuant to Tex. Educ. Code §§ 35.065 and 35.121, or the Commissioner's letter of February 21, 1995, pending a ruling from this Court regarding the necessity for preclearance for those enactments under § 5 of the Voting Rights Act.

SIGNED and ENTERED this *11th* day of *May* 1995.

FORTUNATO P. BENAVIDES
JUDGE, UNITED STATES
COURT OF APPEALS FOR
THE FIFTH CIRCUIT

/s/
ORLANDO L. GARCIA
UNITED STATES
DISTRICT JUDGE

/s/
EDWARD C. PRADO
UNITED STATES
DISTRICT JUDGE

August 14, 1995

The Honorable Antonio O. Garza, Jr.
Secretary of State
Elections Division
P.O. Box 12060
Austin, Texas 78711-2060

Dear Mr. Secretary:

This refers to Chapter 7, Subchapter D; Chapter 11, Subchapter C; Chapter 12; Chapter 13; Chapter 39; and Chapter 45 of Senate Bill 1 (1995), which concern the Texas Education Code, submitted to the Attorney General pursuant to section 5 o f the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received your submission on June 13, 1995.

The State has an obligation under the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended, to describe "with sufficient particularity" all voting changes contained in a submission, 28 C.F.R. 51.26 (c) and 51.27 (c). In this instance, the State has not identified with sufficient particularity all of the voting changes contained in Senate Bill 1 (1995). Below is a description of the voting changes that were apparent from a review of the information provided by the State. We are compelled to point out that the description that follows may not represent all of the voting changes contained in the legislation, and that if other voting changes are contained therein, they will be subject to section 5 review.

Chapter 7, Subchapter D authorizes the State Board of Education to create special school districts; requires the State Board of Education to adopt probation and revocation procedures for home-rule school districts; lowers the age

qualification for Board of Education candidates; and changes the method of filling vacancies on the Board of Education.

Chapter 11, Subchapter C enables the board of trustees of existing independent school districts to increase the number of trustees to seven; enables independent school districts to adopt cumulative voting and provides the procedures and requirements relating thereto; prevents a candidate for a numbered position from declaring the specific position for which, and the candidate against whom, he/she is running; eliminates the ability to use the majority vote requirement where numbered positions are used; requires all school boards to have three or four year terms of office; authorizes school boards to adopt the methods by which the change in the term of office shall be implemented; prevents school boards from altering the term of office once three or four year terms have been adopted; eliminates the deadlines for printing ballots and for calling elections, eliminates the election date; and eliminates the provision stating that an at-large representative who moves out of the school district vacates his/her post.

Chapter 12 enables independent school districts to adopt a home-rule charter; provides the procedures and requirements for adopting, amending, placing on probation, revoking, or rescinding a home-rule charter; enables the charter commission, with voter approval, to change the method of electing the school board; requires referendum elections pertaining to the adoption, amendment, or rescission of a charter and provides notice, ballot, and scheduling requirements relating thereto; requires minimum voter turnout percentages for the results of referendum elections to be effective; provides the form of government where annexations or consolidations involving home-rule school districts occur; and requires a home-rule school district to send its charter to the Secretary of State's office to determine whether its adoption involves any voting changes.

Chapter 13 enables school districts to annex and consolidate territory pursuant only to new uniform procedures; eliminates the appeal process where both districts disapprove a petition for detachment and annexation; removes the requirement that the majority of the board sign the annexation and detachment petition for uninhabited land that significantly reduces the tax base; requires a school district involved in any of the actions provided for in this Chapter to have a minimum number of students; changes the petition requirement for creation by detachment from ten percent of the voters in the detached portion of each affected district to ten percent of the total voters in the areas to be detached; extends authority to call a creation election to affected school boards as an alternative to petition; removes the requirement that board members approve creation by detachment petitions; requires a minimum voter turnout percentage for the results of referendum elections to be effective; provides a deadline by which the commissioners court must hold a hearing on a creation by detachment petition; and provides the procedures for the creation of governing boards for newly created school districts.

Chapter 39 authorizes the Commissioner or the Texas Education Agency to indefinitely replace an elected or consolidated school board with an appointed special master, management team, board of managers, etc., that will exercise the school board's powers.

Chapter 45 consolidates bond and tax elections.

The Attorney General does not interpose any objection to Chapter 7, Subchapter D insofar as it lowers the age qualification for Board of Education candidates; Chapter 12 insofar as it provides notice, ballot, and scheduling requirements relating to charter related referendum elections and provides the form of government after annexations involving home-rule

school districts; Chapter 13 insofar as it requires a school district involved in any of the actions provided for in this Chapter to have a minimum number of students; extends authority to call a creation election to affected school boards as an alternative to petition; removes the requirement that board members approve creation by detachment petitions; and provides a deadline by which the commissioner's court must hold a hearing on a creation by detachment petition. However, we note that section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of these changes. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.41).

Nor does the Attorney General interpose any objection to Chapter 11, Subchapter C insofar as it allows the board of trustees of existing independent school districts to increase the number of trustees to seven, enables independent school districts to adopt cumulative voting, and authorizes school boards to adopt the methods by which the change in the term of office shall be implemented; Chapter 12 insofar as it enables independent school districts to adopt a home-rule charter; enables the charter commission, with voter approval, to change the method of electing the school board; and requires referendum elections pertaining to the adoption, amendment, or rescission of a charter; Chapter 13 insofar as it provides the procedures for the creation of governing boards for newly created school districts; and Chapter 45 which consolidates bond and tax elections. Again, we note that section 5 expressly provides that the failure of the Attorney General to object does not bar subsequent litigation to enjoin the enforcement of these changes. Moreover, these particular provisions are enabling in nature. Therefore, any changes affecting voting that are adopted pursuant to these provisions will be subject to section 5 review (e.g., any rule-making that involves voting changes). In addition, local jurisdictions proposing to implement voting changes pursuant to these provisions (e.g., referendum elections

and changes in method of election) are not relieved of their responsibility to seek section 5 preclearance. See 28 C.F.R. 51.15.

With regard to the remaining provisions, our analysis indicates that the information sent is insufficient to enable us to determine that the proposed changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, as required under section 5. The following information is necessary so that we may complete our review of your submission.

1. A detailed, chronological description of the process leading to adoption of the proposed changes, including the reasons for these changes, and a detailed description of all discussions, whether formal or informal, involving any member of the state legislature or other state, county, or local school district official or employee, any member of the public or any member of a minority interest group or organization concerning the relative merits or demerits of each of these changes, and any input that may have been received other than through formal meetings and hearings.

2. A description of any alternatives to the proposed changes considered by the legislature, the manner in which each alternative originated, the circumstances in which it was presented to or considered by the legislature, and the reasons why each was rejected or passed over.

3. Copies of the following: (a) all documents relating to the proposed changes, including notes, summaries, minutes, tapes, and transcripts of all discussions, meetings, floor debates and hearings, whether formal or informal, regarding the proposed changes, (b) any correspondence among members of the legislature, other state, county, and local school district

official or employee, any member of the public or any member of a minority interest group or organization regarding the proposed changes; (c) any reports, studies, analyses, summaries, or other documents or publications used by the legislature in devising the proposed changes; and (d) copies of all newspaper articles, editorials, letters to the editor, and advertisements, as well as any other publicity, which address or describe the proposed changes.

4. A description of all formal or informal opportunities afforded members of the minority community, or organizations representing the interests of minority persons, to participate in the development and formulation of the proposed changes. Also, a detailed description of minority input regarding the proposed changes, including the steps taken by the legislature to inform and educate the minority community about the proposed changes and any alternative thereto. We note that you have provided a list of minority legislators and their daytime telephone numbers, but you have not provided the substance of their comments or suggestions, the action taken by the legislature in response, and the reasons for the legislature's action. In addition, please provide this information for any minority persons or organizations commenting on the proposed changes.

5. With regard to the portions of Chapter 7, Subchapter D, which were not precleared above: (a) provide the name, race or ethnic identification and daytime telephone number of each incumbent currently serving on the State Board of Education; (b) provide a detailed explanation of the guidelines and criteria to be used by the State Board of Education in formulating procedures and making rules for placing on probation or revoking home-rule school district charters; an explanation of the reasons the State Board of Education is authorized to make rules that will result in a home-rule charter being placed on probation or revoked; a description

of what, if any, appeal process is provided for a home-rule school district that has been placed on probation or had its charter revoked; and (c) a detailed explanation of the reasons for changing the method of filling vacancies on the Board of Education.

6. With regard to the portions of Chapter 11, Subchapter C, which were not precleared above: (a) in terms of the cumulative voting procedures and the requirement that all school boards adopt three or four year terms of office and a particular staggering schedule, provide a detailed explanation of the reasons school districts with cumulative voting systems will be required to maintain their existing staggering schedule and will be prevented from altering the terms of office, and explain what, if any, consideration was given to the impact staggered terms and specific terms of office may have on the ability of minority voters to elect candidates of choice under a cumulative voting system; (b) provide a detailed explanation of the reasons a candidate for a numbered position will be prevented from declaring the specific position for which, and candidate against whom, he/she is running; (c) clarify whether, or under what circumstances, single-member districts are considered to be "numbered positions" under Texas law, and if so, provide a detailed explanation for requiring school districts with single-member districts to use the plurality vote requirement; and (d) provide a detailed explanation for the elimination of the deadlines for printing ballots and for calling elections, eliminates the election date, and eliminates the provision stating that an at-large representative who moves out of the school district vacates his/her post.

7. With regard to the portions of Chapter 12, which were not precleared above: (a) state whether proposed charters, amendments thereto, and summaries thereof will be provided bilingually; (b) provide the state law and rules referred to in Section 12.027 (a) (3), which if violated, will result in a home-

rule school district charter being placed on probation or revoked; (c) state the grounds or basis upon which a governing body may vote to hold a rescission election; (d) provide a detailed explanation of the reasons for requiring minimum voter turnout percentages to make the results of referendum charter elections effective, any studies or analyses on voter turnout by race/ethnicity in school board elections, and an explanation of what effect this requirement will have on minority voters; (e) indicate the criteria and the benchmark to be used by the Secretary of State's Office in determining whether a voting change has occurred as a result of the adoption of a home-rule school district charter and provide a detailed explanation of the reasons why the Secretary of State's Office will make this determination; and (f) explain the meaning of the word "status" as it is used in Section 12.029 and indicate whether the method of election for the consolidated school district will be provided on the ballot.

8. With regard to the portions of Chapter 13, which were not precleared above: (a) provide a chart which compares and contrasts the voting practices and procedures currently used in making annexations and consolidations and those proposed under the new uniform procedures; (b) provide a detailed explanation of the reasons for the elimination of the appeal process where both of the affected boards disapprove a petition for detachment and annexation; (c) provide a detailed explanation of the reasons for removing the requirement that the majority of the board sign the annexation and detachment petition for uninhabited land that significantly reduces the tax base; (d) provide a detailed explanation of the reasons for changing the petition requirement for creation by detachment from ten percent of the voters in the detached portion of each affected district to ten percent of the total voters in the areas to be detached; (e) provide a detailed explanation of the reasons for requiring minimum voter turnout percentages to make the results of creation by detachment elections effective, any studies

or analyses on voter turnout by race/ethnicity in creation by detachment elections, and an explanation of what effect this requirement will have on minority voters.

9. With regard to Chapter 39: (a) provide a detailed explanation of the powers, duties, responsibilities, and roles that will be played by the Commissioner, the Texas Education Agency, and the State Board of Education in the decision to investigate and/or replace an elected or consolidated school board with an appointed master, team, board, etc.; (b) provide a detailed explanation of the criteria for the selection of a special master, management team members, board of managers, etc.; (c) provide a detailed explanation of the circumstances that will result in the investigation and/or replacement of an elected or consolidated school board and the criteria that will be used by the Commissioner, the Texas Education Agency, and the State Board of Education in making such determinations; (d) provide a detailed description of the powers, duties, and responsibilities for appointed masters, teams, boards, etc., and describe in detail, what, if any, differences there are between the powers, duties, and responsibilities of appointed masters, teams, boards, etc., and those of elected or consolidated school boards; (e) a detailed explanation of the standards or criteria the Commissioner will use in the 90-day review of whether a master, team, board, etc. is still necessary; and (f) a description of the appeal process, if any, for a school district whose board has been replaced by a master, team, board, etc.

The Attorney General has sixty days to consider a completed submission pursuant to section 5. This sixty-day review period will begin when we receive the information specified above. See the Procedures for the Administration of Section 5 (28 C.F.R. 51.37). However, if no response is received within sixty days of this request, the Attorney General may object to the proposed changes consistent with the burden of proof placed upon the submitting authority. See also 28

C.F.R. 51.40 and 51.52(a) and (c). Changes which affect voting are legally unenforceable unless section 5 preclearance has been obtained. Clark v. Roemer, 500 U.S. 646 (1991); 28 C.F.R. 51.10. Therefore, please inform us of this action the State of Texas plans to take to comply with this request.

Finally, although the State notes in its submission letter that the adoption of Chapter 11, Subchapter H which refers to special purpose school districts or Section 12.058 or 12.111 of Chapter 12 which provide for campus or campus program charters and open enrollment charters, respectively, do not involve changes in election procedures, we respectfully disagree insofar as Chapter 11, Subchapter H appears to provide for a change from an elected system to an appointed system and Chapter 12, Section 12.058 and 12.111 appear to be enabling legislation allowing for the creation of elected boards.

It is necessary that these changes either be brought before the District Court for the District of Columbia or submitted to the Attorney General for a determination that they do not have the purpose and will not have the effect of discriminating on account of race, color, or membership in a language minority group. Changes which affect voting are legally unenforceable without section 5 preclearance. Clark v. Roemer, 500 U.S. 646 (1991); Procedures for the Administration of Section 5 (28 C.F.R. 51.10).

Should you elect to make a submission to the Attorney General for administrative review rather than seek a declaratory judgment from the District Court for the District of Columbia, please follow the procedures set forth in Subparts B and C of the procedural guidelines.

If you have any questions concerning this letter or if we can assist you in obtaining the requested information, you should call Mr. Jeffrey Saxe (202-514-6335) of our staff. Refer

to File Nos. 95-1726 and 95-2432 in any response to this letter so that your correspondence will be channeled properly.

Sincerely,

Deval L. Patrick
Assistant Attorney General
Civil Rights Division

By: */s/*

for Elizabeth Johnson
Acting Chief, Voting Section

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION
Filed January 16, 1996

JIMMIE CASIAS, SANTIAGO PACHECO, and MARY OCHOA,	)	
Plaintiff(s)	)	
v.	)	CIVIL ACTION NO. SA-95-CA-0221
MICHAEL MOSES, Texas Commissioner of Education, TEXAS EDUCATION AGENCY, TEXAS STATE BOARD OF EDUCATION, and STATE OF TEXAS,	)	consolidated with
Defendant(s).	)	
UNITED STATES OF AMERICA,	)	
Plaintiff(s),	)	
v.	)	CIVIL ACTION NO. SA-95-CA-0275
MICHAEL MOSES, Texas Commissioner of Education, TEXAS EDUCATION AGENCY, TEXAS STATE BOARD OF EDUCATION, and STATE OF TEXAS,	)	
Defendants(s).	)	

ORDER DISMISSING ACTION AS MOOT

Before FORTUNATO P. BENAVIDES, Circuit Judge, and EDWARD C. PRADO and ORLANDO L. GARCIA, District Judges.[1]

This is an action under section 5 of the Voting Rights Act of 1965 ("VRA"), as amended, 42 U.S.C. § 1973c. It is a consolidation of two similar lawsuits challenging the State of Texas's appointment of a management team to oversee and direct the operation of the Board of Trustees of the Somerset Independent School District. The appointment was made under Sections 35.065 and 35.121 of the Texas Education Code. In the first lawsuit, Plaintiffs seek a declaration that the above sections are changes affecting voting requiring preclearance review under the VRA. They request an injunction preventing the State from taking any future action under the sections until preclearance review is obtained. For all practical purposes, the second lawsuit, brought by the United States, seeks the same relief.

On May 11, 1995, the Court entered an order granting preliminary injunctive relief against the State and requiring further briefing on the propriety of a permanent injunction. During the briefing period, the Texas legislature enacted Senate Bill 1, replacing the provisions of Chapter 35 of the former Education Code with new provisions codified at Chapter 39. In addition, the contested provisions of Chapter 35 were repealed. Senate Bill 1 was then submitted to the Attorney General for preclearance review under the VRA.

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[1] In March 1995, the Chief Judge of the Court of Appeals for the Fifth Circuit entered an orders in both cases appointing this three-judge panel in accordance with the provisions of 42 U.S.C. § 1973c and 28 U.S.C. § 2284.

On December 13, 1995, we received notice that Chapter 39 had been precleared as enabling legislation.

We now must consider whether this action is moot in light of the repeal of Chapter 35, the enactment of Chapter 39 and its preclearance under § 5 of the Voting Rights Act. We hold that it is. Consequently, we grant the State's motion to dismiss for mootness, deny the Plaintiffs' motion to amend their complaint and their request for declaratory and permanent injunctory relief, and deny the United States' motion for partial summary judgment.

I. Background.

Our May 11, 1995 order granting preliminary injunctive relief in favor of Plaintiffs describes in detail the events leading to the filing of these lawsuits. We repeat only those facts necessary to our adjudication of the mootness issue.

Sections 35.065 and 35.121 of the Texas Education Code were enacted in 1993 with passage of Senate Bill 7. See Tex. S.B. 7, ch. 347, 73rd Leg., R.S. (1993). These provisions authorize "special accreditation investigations" of school districts, see Tex. Educ. Code § 35.065(a)(Vernon Supp. 1995), and provide for the imposition of sanctions when the district does not satisfy accreditation criteria, see id. § 35.121(a). Among those sanctions is the appointment of "a management team to direct the operations of the district in areas of unacceptable performance." Id. § 35,121(a)(8). By the terms of Senate Bill 7, however, these sections were repealed effective September 1, 1995. See Tex. S.B. No. 7, § 8.33(2).

On May 30, 1995, Senate Bill 1 was signed into law. See Tex. S.B. 1, 74th Leg., R.S. (1995). In this bill, Titles 1 and 2 of the Education Code were reenacted and revised. Id. § 1. Chapter 39 of the bill contains new provisions governing the appointment of management teams. See Tex. Educ. Code

§ 39.131(e). In addition, Senate Bill 1 expressly repealed the former provisions of Chapter 35. See Tex. S.B. 1, § 58(a)(6).

The State contends that the new provisions of Chapter 39 ameliorate the concerns with the former provisions of Chapter 35. Nevertheless, it submitted Senate Bill 1, including the provisions in Chapter 39 dealing with the appointment of a management team, to the Attorney General for preclearance review under the VRA. On August 14, 1995, the Attorney General requested additional information as to these and other sections of Senate Bill 1. On December 11, 1995, she precleared the submitted provisions of Chapter 39 as enabling legislation. See 28 C.F.R. § 51.15 (1995). Therefore, the State is required to seek section 5 preclearance before actually implementing the provisions of Chapter 39 in a school district. See id.

II. Dismissal for Mootness.

Article III of the United States Constitution limits federal court jurisdiction to "cases and controversies." U.S. Const. art. III; see United States Nat' l Bank v. Independent Ins. Agents of Am., Inc., 113 S. Ct. 2173, 2178 (1993). Therefore, "a federal court has no authority 'to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" Church of Scientology v. United States, 506 U.S. 9, 113 S. Ct. 447, 449 (1992)(quoting Mills v. Green, 159 U.S. 651, 653 (1895)). A case becomes moot if "(1) it can be said with assurance that 'there is no reasonable expectation . . .' that the alleged violation will recur, and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation." County of Los Angeles v. Davis, 440 U.S. 625, 631 (1979)(citations omitted); see also Church of Scientology, 113 S. Ct. at 449 (case must be dismissed as moot if, due to

intervening event, the court is unable to grant "'any effectual relief whatever"').

In a case under the VRA, our role is limited. We must simply determine whether the challenged legislation is within the purview of the VRA and must be submitted for approval under section 5 of the Act. See Allen v. State Bd. of Elections, 393 U.S. 544, 555 n. 19 (1969). While the court is empowered to grant injunctive relief in such an action, it extends only until the proposed legislation is submitted for preclearance review. See. id., 393 U.S. at 555. "Once the State has successfully complied with the § 5 approval requirements, private parties may enjoin the enforcement of the new enactment only in traditional suits attacking its constitutionality; there is no further remedy provided by § 5." Id. at 549-50.

Here, the provisions of Chapter 35 initially challenged by Plaintiffs and the United States have been repealed. Since the State replaced Chapter 35 with new provisions in Chapter 39, which again authorize the appointment of a management team in a troubled school district, the case was not automatically rendered moot. See Northeastern Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Fla., 113 S. Ct. 2297, 2301 (1993)(repeal of challenged ordinance and replacement with new ordinance differing in some respects from old did not moot case). Nevertheless, before implementing Chapter 39, the State submitted it and other sections of Senate Bill 1 for preclearance review. Upon its compliance with the preclearance requirements of section 5 of the VRA, Plaintiffs and the United States obtained the relief they sought by filing this action, and the action became moot.[2]

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[2] We are not persuaded by the United States' and Plaintiffs' arguments in opposition to the State's motion to dismiss for mootness. They claim that the State does not view

In addition, now that the Attorney General has completed her determination, no further judicial review by this Court is authorized. See Morris v. Gressette, 432 U.S. 503, 504-05 (1977). Although Plaintiffs may subsequently challenge the legislation in "traditional constitutional litigation . . . it cannot be questioned in a suit seeking judicial review of

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Chapter 39 as containing changes affecting voting and that it might again attempt to implement either Chapter 35 or Chapter 39 before preclearance has been obtained. For these reasons, they maintain that we should retain jurisdiction over this case, or at least hold it in abeyance pending the Attorney General's determination.

The only evidence to support these contentions is language in the State's letter submitting Senate Bill 1 to the Attorney General for preclearance review and a newspaper article concerning recent events at the Somerset Independent School District. As to the language in the submission letter, the State was required to include certain explanatory statements with the submission. See 28 C.F.R. § 51.27(c). It is entitled to argue its case to the Attorney General, just as other interested parties may submit information and comments they believe are material to the Attorney General's determination. See id. § 51.29. Furthermore, we question whether the newspaper article is admissible to show the threat of future action by the State. See New England Mut. Life Ins. Co. v. Anderson, 888 F.2d 646, 650 (10th Cir. 1988)(finding newspaper article inadmissible as hearsay). Assuming it is, the article stated only that the TEA was only prepared to "monitor" the school district, an action involving different considerations than the appointment of a management team. See Tex. Educ. Code § 39.131(a)(6).

In any event, the Attorney General has completed her review, eliminating any possibility that Chapter 39 would be implemented before preclearance occurred.

the Attorney General's exercise of discretion under § 5, or [her] failure to object within the statutory period." Id. at 507; see also City of Dallas v. United States, 482 F. Supp. 183, 186 (D.D.C. 1979). For these reasons, we conclude that this case is moot.

III. Conclusion.

Because this action presents no live dispute, we grant the State's motion to dismiss for mootness. It follows that the United States' motion for partial summary judgment, as well as Plaintiffs' request for permanent injunctive relief, both of which concern the now-repealed Chapter 35, must also be denied as moot. Finally, because the contested provisions of Chapter 39 have been precleared as enabling legislation, Plaintiff's amendment of their complaint to include reference to Chapter 39 would be futile. Therefore, that motion is also denied. See Davis v. Louisiana State Univ., 876 F.2d 412, 413 (5th Cir. 1989); Emory v. Texas State Bd. of Medical Examiners, 748 F.2d 1023, 1027 (5th Cir. 1984). Accordingly,

IT IS ORDERED THAT the Defendant's motion to dismiss for mootness, filed June 29, 1995, is GRANTED; and

IT IS FURTHER ORDERED THAT Plaintiffs' motion to amend their complaint, as amended and filed September 18, 1995, and their request for declaratory and permanent injunctory relief are DENIED; and

IT IS FURTHER ORDERED THAT the United States' motion for partial summary judgment, filed July 12, 1995, is DENIED.

SIGNED and ENTERED this ____ day of ~~December,~~ *January* 1995*6*.

/s/

FORTUNATO P. BENAVIDES
JUDGE, UNITED STATES
COURT OF APPEALS FOR THE
FIFTH CIRCUIT

/s/

EDWARD C. PRADO
UNITED STATES DISTRICT
JUDGE

/s/

ORLANDO L. GARCIA
UNITED STATES DISTRICT
JUDGE

(5)

No. 97-29

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

STATE OF TEXAS, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF STATE APPELLANT

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November 1997

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QUESTION PRESENTED

In 1995, the State of Texas submitted changes to its Education Code to the Department of Justice (the "DOJ") for preclearance under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c. Although the state believed that the sanctions provisions of the Education Code, which provided the Commissioner of Education with the ability to hold deficient school districts accountable, are not changes affecting voting, DOJ disagreed, and precleared Texas Education Code § 39.131(a)(7) and (a)(8) as enabling legislation. Because Texas disagreed with the DOJ's over-expansive interpretation of the scope of § 5, Texas later filed a declaratory judgment suit in federal district court seeking a determination that § 39.131 (a)(7) and 39.131(a)(8) were not subject to § 5 preclearance, because they did not constitute a change affecting voting. In the alternative, Texas sought a declaratory judgment that the preclearance provisions of § 5 do not apply to actions taken pursuant to the federal Improving America's School Act, 20 U.S.C. § 6301 *et seq.*, as modified under the waiver authority of the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891(e) ("Ed-Flex"). The district court dismissed Texas' suit on the grounds that Texas' claims were not ripe. The question presented is:

Is a state's claim that an amendment to a statute is not subject to the preclearance requirements of § 5 of the Voting Rights Act ripe, when the United States Attorney General has precleared the statute as "enabling" legislation, but the State has taken no action under the "enabling" legislation?

PARTIES TO THE PROCEEDING

Plaintiff

The State of Texas

Defendant

The United States of America

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OPINION BELOW

The unreported opinion of the three-judge district court is set out in the Appendix to the Jurisdictional Statement ("J.S. App.") at 1a-10a. The court's order is at J.S. App. 11a-12a. The amended opinion of the three-judge district court, which is identical to the original opinion, but contains the signatures of all three participating judges, is set out at J.S. App. 13a-23a. The court's amended order is at 24a-25a.

Jurisdiction

The judgment of the United States District Court for the District of Columbia was entered on March 5, 1997. An amended judgment, signed by all three judges, was filed on March 17, 1997. The State filed a notice of appeal to this Court on April 23, 1997, J.S. App. 26a-27a, and filed a supplemental notice of appeal on May 12, 1997. J.S. App. 28a-29a. This Court has jurisdiction under 42 U.S.C. § 1973c and 28 U.S.C. § 2101(b).

Constitutional and Statutory Provisions Involved

The relevant federal statutory provisions are: the Voting Rights Act, 42 U.S.C. § 1973c; the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891(e) ("Ed-Flex"); Goals 2000: Educate America Act, 20 U.S.C. § 5801 *et seq.*; and the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 *et seq.*

The relevant state statutory provisions are Texas Education Code, §§ 39.131(a) and (e). The relevant state and federal statutes are set out at J.S. App. 49a-92a.

Statement of the Case

Texas, like all states, has a substantial interest in the education of its children. Recognizing that "[a] general diffusion of knowledge [is] essential to the preservation of the liberties and rights of the people," Texas has made it "the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." TEX. CONST. art. VII, § 1. Article VII, § 3 of the Texas Constitution provides in part that "the Legislature may also provide for the formation of school district[s] by general laws." Texas has one thousand fifty-eight (1,058) school districts, each run by a school board elected from the school district. The schools are financed through a combination of state funding and local taxes raised by the school districts. The State Board of Education,[1] which is composed of fifteen (15) members elected statewide from single member districts, is responsible for developing the curriculum required of all Texas schools,[2] setting high school graduation requirements,[3] adopting textbooks for purchase with state funds,[4] and implementing a statewide assessment program.[5] The Commissioner of Education ("the Commissioner"),[6] as head

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[1] *See generally* TEX. EDUC. CODE §§ 7.101-7.112.

[2] TEX. EDUC. CODE § 28.002.

[3] TEX. EDUC. CODE § 28.025.

[4] TEX. EDUC. CODE § 31.024.

[5] TEX. EDUC. CODE § 39.022.

[6] *See generally* TEX. EDUC. CODE §§ 7.051-7.057.

of the Texas Education Agency ("TEA")[7] and Executive Secretary to the State Board of Education, is charged with implementing and enforcing state and federal education law and State Board of Education requirements, including sanctions under Chapter 39 of the Texas Education Code. Public schools in Texas are thus the joint responsibility of the local school districts and the state.

A. The Educational Reforms of 1993

In 1993, the Texas Legislature made "significant educational reforms in Chapter 35 of the Texas Education Code, entitled 'Public School System Accountability.'" *Edgewood Indep. School Dist. v. Meno*, 917 S.W.2d 717, 728 (Tex. 1995). The Supreme Court of Texas described the reforms in Chapter 35 in the following terms:

> In this Chapter, the Legislature defines the contours of its constitutional duty to provide a "general diffusion of knowledge" by articulating seven public education goals. These goals emphasize academic achievement. Most notably, the Legislature envisions that all students will have access to a high quality education and that the achievement gap between property-rich and property-poor districts will be closed. The Legislature has established a system of student assessment and school district accreditation to measure each district's progress toward meeting these goals. Districts that chronically fail to maintain accreditation standards are subject to penalties...

Edgewood, 917 S.W.2d at 728-729 (citations omitted).

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[7] *See generally* TEX. EDUC. CODE §§ 7.021-7.024.

The legislature empowered the Commissioner to ensure that all schools in the state are providing a quality education to Texas children while meeting the requirements of federal and state law. Thus, each school district must account for its failures to the Commissioner and the Commissioner will recognize each school district for its successes. The accountability regime was established at the same time that the Texas Legislature completely revised the state's school finance system, which had three times been held unconstitutional by the Texas Supreme Court. *Edgewood Indep. School Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *Edgewood Indep. School Dist. v. Kirby*, 804 S.W.2d 491 (Tex. 1991); *Carrollton-Farmers Branch Indep. School Dist. v. Edgewood Indep. School Dist.*, 826 S.W.2d 489 (Tex. 1992). That Court subsequently found the new school finance system constitutional, relying in part on the accountability system as meeting the legislature's constitutional requirement to provide for a general diffusion of knowledge statewide. *Edgewood*, 917 S.W.2d at 730. ("The accountability regime set forth in Chapter 35, we conclude, meets the legislature's constitutional obligation to provide for a general diffusion of knowledge statewide.") The State did not submit these amendments to Chapter 35 for preclearance because it did not believe that these were changes with respect to voting within the meaning of § 5 of the Voting Rights Act.

B. The 1993 Reforms are Challenged and the Texas Legislature Responds

In 1995, private plaintiffs and the United States independently brought § 5 challenges to the Commissioner's appointment, pursuant to Chapter 35, of a management team to a deficient school district. *Casias v. Moses*, No. SA-95-CA-0221 (W.D. Tex. May 11, 1995), *dismissed as moot*, No. SA-95-CA-0221 (W.D. Tex. Jan. 16, 1996), and *United States v. Moses*, No. SA-95-CA-275 (W.D. Tex. 1995). The Commissioner appointed the management team because "a

volatile and potentially violent situation existed that threatened the day-to-day operations of the district and was likely to 'spill over into the schools impacting the learning environment and endangering student and staff safety.'" Jt. App. 24. Plaintiffs alleged that because the provision authorizing the Commissioner to appoint a management team was a change affecting voting, it was subject to the preclearance requirements of § 5 of the Voting Rights Act. In its order granting plaintiffs a preliminary injunction, the three-judge panel expressed concern that placement of a management team could constitute a *de facto* replacement of an elected school board with an appointed authority. Jt. App. 27. The court was particularly concerned with the "broad authority given the management team." Jt. App. 28. The court enjoined the State from implementing Chapter 35 until it was precleared. Jt. App. 29-30.

In 1995, the Texas Legislature completely rewrote the Texas Education Code by passing Senate Bill 1 ("S.B. 1"). S.B. 1 enacted a comprehensive deregulation of public education in exchange for clearly defined standards of accountability. In direct response to *Casias*,[8] Section 39.131(e) was amended specifically to ensure that the sanctions in § 39.131(a)(7) and (8), providing for the temporary placement of a master or management team, would not implicate the Voting Rights Act. J.S. App. 46a. Section 39.131(e) specifically limits the authority of the master or management team and provides that any placement is temporary. J.S. App. 91a.

C. A Summary of the Legislative Response: Chapter 39

Texas law decrees that all students attending Texas public schools must "demonstrate exemplary performance in the reading and writing of the English language . . . in the

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[8] The *Casias* court issued its preliminary injunction on May 11, 1995. The Texas Legislature passed S.B. 1 before it adjourned on May 29, 1995.

understanding of mathematics . . . in the understanding of science . . . [and] in the understanding of social studies." TEX. EDUC. CODE § 4.002. In order to insure that these goals are met, the legislature erected a comprehensive system that holds public schools and school districts accountable for student academic performance. TEX. EDUC. CODE §§ 39.021-131.

Chapter 39 contains, *inter alia*, a detailed legislative prescription for the assessment of academic skills, §§ 39.021-033,[9] for the development of performance indicators, §§ 39.051-.054,[10] for the determination of accreditation status, §§ 39.071-.076,[11] and for the imposition of accreditation sanctions,

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[9] Subchapter B, entitled "Assessment of Academic Skills," establishes the use of statewide tests that are administered to all Texas public school children at different points in their education. These tests are known as the "Texas Assessment of Academic Skills," or "TAAS" tests. The purpose of these tests is "to ensure school accountability for student achievement that achieves the goals provided under Section 4.002." TEX. EDUC. CODE § 39.022.

[10] Subchapter C entitled "Performance Indicators," requires the State Board of Education to establish "indicators of the quality of learning on a campus." TEX. EDUC. CODE § 39.051(a). "The indicators must be based on information that is disaggregated with respect to race, ethnicity, sex, and socioeconomic status and must include," *inter alia*, the results of the skills assessment test, dropout rates, student attendance rates, the percentage of graduating students that pass exit-level skills assessment test, the percentage of graduating students who meet the course requirements for the recommended high school program established by the State Board of Education, and the results of the Scholastic Assessment Test (SAT) and the American College Test (ACT). TEX. EDUC. CODE § 39.051(b).

[11] Subchapter D, entitled "Accreditation Status," provides for "rules to evaluate the performance of school districts and to assign to each district a performance rating" of (1) exemplary, (2) recognized, (3) academically acceptable, or (4) academically unacceptable. TEX. EDUC. CODE § 39.072(a).

§ 39.131.[12] The ultimate goal of Chapter 39 is to measure the academic performance of Texas school children and to reward those schools and school districts that achieve the legislative goals or to sanction those schools or school districts that fail to achieve the legislative goals.

More specifically, § 39.131(a) of Chapter 39 of the Texas Education Code authorizes the Commissioner to impose sanctions on a school district in several circumstances in which the school district does not satisfy the accreditation criteria found at §§ 39.071-39.076. First, the Commissioner may impose sanctions upon a district based upon a lowered or unimproved accreditation rating where an annual review of academic performance reveals unacceptable performance by a subgroup for which data is disaggregated as to race, ethnicity, sex, or socioeconomic status under §§ 39.073 and 39.051(b).[13] Second, the Commissioner is authorized to impose sanctions upon a district where an investigation discloses violations of federal law or regulations regarding federally-required or funded programs. TEX. EDUC. CODE § 39.074. Finally, the Commissioner is authorized to impose sanctions on a district

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[12] Subchapter G, entitled "Accreditation Sanctions," *inter alia*, provides the Commissioner with a list of sanctions, increasing in severity, that he may impose on school districts that do not satisfy the accreditation criteria established by §§ 39.071-.076. TEX. EDUC. CODE § 39.131(a).

[13] *See supra* footnotes 9 and 11. Students are tested by a state administered exam and school districts are rated according to the performance of students in that district on the exam. The exam results are disaggregated by the ethnicity of students in the district and the district is held accountable for the performance of each group. For example, a school district in which a high proportion of African-American students failed the math portion of the exam is designated as low-performing based solely on the performance of this group of students. This regimen forces the school district and the state to focus on ways to increase the performance of all student groups. This procedure has worked; it has resulted in increased performance by all student groups statewide since its inception.

where an investigation discloses a violation of the state's accountability system, required accounting and financial practices, excessive alternative placements of students, violation of civil rights or other federally-imposed requirements, or of the legally-established roles of superintendent and board of trustees. TEX. EDUC. CODE § 39.075.

The sanctions options available to the Commissioner include: (1) issuance of a public notice of the deficiency to the board of trustees; (2) ordering a hearing conducted by the board of trustees of the district to notify the public of the unacceptable performance, the improvements in performance expected by the agency (TEA), and the sanctions that may be imposed if the performance does not improve; (3) ordering the preparation of a student achievement improvement plan that addresses each academic excellence indicator for which the district's performance is unacceptable, submission of the plan to the Commissioner for approval, and implementation of the plan; (4) ordering a hearing to be held before the Commissioner or his designee at which the president of the board of trustees and the superintendent of the district shall appear and explain the district's low performance, lack of improvement, and plans for improvement; (5) arranging an on-site investigation of the district; and, (6) appointing an agency monitor to participate in and report to the agency on the activities of the board of trustees or superintendent. TEX. EDUC. CODE §§ 39.131(a)(1)-(6).

Other sanctions available to the Commissioner include: (7) appointing a master to oversee the district's operations; (8) appointing a management team to direct the operations of the district in areas of unacceptable performance or requiring the district to obtain certain services under contract with another person; (9) appointing a board of managers composed of residents of the district to exercise the powers and duties of the board of trustees if a district has been rated academically unacceptable for a period of one year or more; and (10) annexing the district to one or more adjoining districts, or

requesting the Board of Education to revoke a district's home-rule school district charter, if a district has been rated as academically unacceptable for a period of two years or more. TEX. EDUC. CODE § 39.131(a)(7)-(10).[14]

The Commissioner may impose sanctions on a school district "to the extent the Commissioner determines necessary." TEX. EDUC. CODE § 39.131(a). However, § 39.131(c) requires

> ... the commissioner [to] review annually the performance of a district or campus subject to this section to determine the appropriate actions to be implemented under this section. The commissioner must review at least annually the performance of a district for which the accreditation rating has been lowered due to unacceptable student performance and may not raise the rating until the district has demonstrated improved student performance. If the review reveals a lack of improvement, the commissioner shall increase the level of state intervention and sanction unless the commissioner finds good cause for maintaining the current status.

TEX. EDUC. CODE § 39.131(c).

The flexibility to choose different sanctions as needed allows the Commissioner to deal quickly and effectively with problems that jeopardize the education of Texas children in a particular school district.

TEA policy requires first the imposition of sanctions that do not include the appointment of a master or management team. In fact, most interventions begin and end with a required

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[14] The sanctions contained in § 39.131(a)(7) and (a)(8) are the issue in this action; sanctions (9) and (10) are not in issue in this action.

improvement plan, § 39.131(a)(3), a hearing, § 39.131(a)(4), or the presence of a monitor, § 39.131(a)(6). Nonetheless, the appointment of a master or management team for a short time period as provided by § 39.131(a)(7) and (8) and as limited by § 39.131(e) gives the Commissioner the necessary tools with which to deal with serious problems that threaten the educational process in a district.

When the Commissioner appoints a master or management team to oversee the operations of a school district, the Commissioner must clearly define their powers and duties. TEX. EDUC. CODE § 39.131(e). The Commissioner does not have free rein, however. These duties are expressly limited by state law. A master or management team may: (1) direct an action to be taken by the principal of a campus, the district superintendent, or the district's board of trustees; and (2) approve or disapprove any action of the campus principal, the district superintendent, or the district's board of trustees. TEX. EDUC. CODE § 39.131(e)(1), (2). However, a master or management team cannot take any action concerning a district election, including ordering or canceling an election or altering the date of, or the polling places for, an election; changing the number, or method, of selecting the board of trustees; setting a tax rate for the district; and adopting a budget for the district that provides for spending a different amount, exclusive of required debt service, from that previously adopted by the board of trustees. TEX. EDUC. CODE § 39.131(e)(3)-(6).[15]

The elected board of trustees is not displaced during the time the master or management team is in place. The school board continues to meet and make decisions. It continues to have all the authority with which it is vested by Chapter 11 of

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[15] The Texas Legislature imposed these prohibitions to ensure specifically that the sanctions in § 39.131(a)(7) and (8), providing for the temporary placement of a master or management team, would not implicate the Voting Rights Act. *See, e.g., Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992).

the Education Code except in those areas of deficiency that led to the temporary appointment of the master or management team. In these special areas of deficiency, the master or management team is authorized to act in a manner that will correct the specific deficiency. Moreover, under § 39.131(e), the Commissioner must evaluate the continued need for the master or management team every 90 days. The appointment, by law, is not permanent. Unless that evaluation indicates that continued appointment is necessary for effective governance of the district or delivery of instructional services, the master or management team must be removed. *Id.* Moreover, a party that disagrees with the Commissioner's appointment of a master or management team has a right to appeal the Commissioner's action to the district court of Travis County, Texas located in Austin, Texas. TEX. EDUC. CODE § 7.057(d). This procedure provides an aggrieved party the opportunity of contesting and overturning the Commissioner's appointment in a state district court.

D. DOJ Preclears Chapter 39

On June 12, 1995, Texas submitted S.B.1 to the United States Department of Justice ("DOJ") for administrative preclearance under § 5 of the Voting Rights Act and asked for expedited review because "many of the over 1,000 school districts in Texas will need to proceed as soon as possible in order to implement various provisions of the Act for the 1995-1996 school year." J.S. App. 45a. Texas did not believe that the sanctions provisions of § 39.131(a)(1)-(10) constituted election-related changes.[16] However, DOJ instructed the State

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[16] The State's view was based on the belief that the legislature's amendments to Chapter 39 made clear that the appointment of a master or management team was not election related. Thus, the State's preclearance letter stated:

that, in its opinion, some of the sanctions provisions were changes affecting voting.[17] Although the State disagreed with this opinion, it nonetheless submitted the information requested by DOJ in order to obtain a quick resolution. J.S. App. (Vol. 2) 93a-102a

DOJ agreed with Texas that the sanctions under § 39.131(a)(1)-(6) are not voting changes subject to preclearance under § 5 of the Voting Rights Act. They are not in issue here. However, DOJ determined that the sanctions under § 39.131(a)(7) and (8) were changes affecting voting and precleared them only as enabling legislation.[18] J.S. App. 35a-38a. By preclearing these two sanctions provisions as enabling

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> In our opinion, as the permanent elective structure of the board of trustees is not altered by these temporary emergency procedures, neither this section nor the management team procedures in Section 39.131(e) are election-related, and do not require preclearance; nevertheless, we bring these sections to your attention for your consideration.

J.S. App. 33a.

[17] The DOJ's letter to the State asserted that

> Chapter 39 authorizes the Commission or the Texas Education Agency to *indefinitely replace* an elected or consolidated school board with an appointed special master, management team, board of managers, etc., that will exercise the school board's power.

Jt. App. 33 (emphasis added). This letter requests more information concerning Chapter 39. Jt. App. 39.

[18] DOJ also determined that Texas must obtain preclearance in each instance it imposes sanctions under § 39.131(a)(9) and (10). J.S. App. 37a-38a. These sanctions provisions, however, are not at issue in this case.

legislation,[19] DOJ required Texas to obtain preclearance of each and every decision by the Commissioner to appoint, pursuant to § 39.131(a)(7) and (8), a master or a management team to oversee the operations of a school district that does not satisfy the accreditation criteria. J.S. App. 37a-38a.

E. Texas Becomes an Ed-Flex Partnership State

In January 1996, Texas was selected as one of seven Ed-Flex Partnership states, pursuant to the Educational Flexibility Partnership Demonstration Act ("Ed-Flex"), 20 U.S.C. § 5891 *et seq*. *See* Letter from Richard W. Riley, Secretary, United States Department of Education, to Michael A. Moses, Commissioner of Education, with attachments (Jan. 26, 1996), J.S. App. 39a-48a. Ed-Flex provides that the Secretary of Education may authorize state educational agencies in eligible states to waive federal statutory or regulatory requirements applicable to certain federal programs. 20 U.S.C. § 5891(e)(2), 20 U.S.C. § 5891(e)(4)(B)(ii). One of the programs whose statutory requirements can be waived is Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 *et seq.*, which includes corrective actions that a state must take against a school district that fails to make adequate progress towards meeting the state's student performance standards. 20 U.S.C. § 6317(d)(6)(A).

Because Texas is designated as an Ed-Flex partner, it may waive federal education regulations and statutory requirements, and replace them with its own regulations. 20 U.S.C. § 5891(e)(4)(B)(ii). As an Ed-Flex Partnership state, Texas substituted its accountability provisions, including the sanctions listed in § 39.131(a), for the provisions of federal law. 20 U.S.C. § 5891(b)(1). In other words, § 39.131(a)(7) and (a)(8) are sanctioned by Congress' federal education laws.

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[19] *See* 28 C.F.R. § 51.15.

F. The Lawsuit Below

On June 7, 1996, Texas filed its complaint under the Voting Rights Act, 42 U.S.C. § 1973c, seeking a declaratory judgment that the temporary placement of a master or a management team under §§ 39.131(a)(7) and (8) as limited by § 39.131(e) of the Texas Education Code is not a change affecting voting. In the alternative, Texas sought a declaratory judgment that the preclearance provisions of § 5 of the Voting Rights Act do not apply to actions taken pursuant to the Improving America's Schools Act, 20 U.S.C. § 6301 *et seq.*, as modified under the waiver authority of the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891(e) ("Ed-Flex").

Texas requested a three-judge panel pursuant to 28 U.S.C. § 2284 and 42 U.S.C. § 1973c. The district court accepted jurisdiction on July 15, 1996, and appointed a three-judge panel on July 22, 1996. Texas then moved for summary judgment. The United States filed a motion to dismiss. After briefing by the parties, the three-judge panel granted the United States' motion to dismiss on March 5, 1997, on the grounds that the case was not ripe for judicial review. J.S. App. 11a-12a; J.S. App. 24a-25a.[20] Texas filed its jurisdictional statement on June 23, 1997. The United States filed its Motion to Affirm on August 28, 1997. This Court noted probable jurisdiction on September 29, 1997.

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[20] The court filed an amended order on March 17, 1997, signed by all three-judges. Except for the signatures of all three-judges, the amended order is identical to the original order, and the amended memorandum opinion is identical to the original memorandum opinion. Cites to the Appendix are to the amended memorandum opinion.

Summary of Argument

This case presents purely legal issues. What Texas seeks here is no different from what the appellants sought in *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992): a legal determination of whether certain provisions of state law are changes affecting voting under § 5 of the Voting Rights Act. Texas asks for a declaratory judgment that §§ 39.131(a)(7) and (8) as limited by § 39.131(e) of the Texas Education Code, which allow for the temporary placement of a master or management team with circumscribed powers, are not a change affecting voting and, therefore, need not be precleared pursuant to § 5 of the Voting Rights Act. No facts are needed to make this legal determination.

The district court erred in dismissing Texas' declaratory judgment action for lack of ripeness. First, the district court erroneously concluded that the case was not ripe under Article III because the State's injuries were "not sufficiently imminent to create a justiciable controversy." J.S. App. 18a. In so ruling, the Court ignored the damage to federalism that results whenever DOJ erroneously requires a state to seek preclearance of legislation that is not a change affecting voting. This damage to its interest in federalism gives Texas standing to complain of DOJ's erroneous conclusion that a provision of Texas law is a change affecting voting that requires preclearance under § 5. This Court in *Allen v. State Board of Elections*, 393 U.S. 544, 562 (1969), recognized that a justiciable controversy arises from the preclearance procedures of § 5 because of "[t]he clash between federal and state power and the potential disruption to state government ... There is no less a clash and potential for disruption when the disagreement concerns whether a state enactment is subject to § 5."

Second, the district court erroneously ruled that the case did not meet the prudential ripeness doctrine articulated in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), in which this Court ruled that for a case to be ripe it must both be

fit for judicial decision and must not impose an undue hardship on the parties. The district court held that the claims presented by Texas--albeit raising purely legal questions--were not fit for judicial decision because "the 'actual contours of [each appointment order] will be determinative of' whether an elected board is displaced *or its powers in any way diminished.*" J.S. App. 19a. The district court's explanation of why the legal question was not fit for judicial decision manifests that the district court assumed the question it was asked to answer: whether the provisions in issue are ones that affect a change in voting or "election law." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 501 (1992).

Finally, the court also held that Texas would not suffer undue hardship if judicial review were withheld, ruling that seeking preclearance each time the Commissioner places a master or management team is not "so unwieldy as to deny Texas a meaningful opportunity to expeditiously implement its statutory scheme." J.S. App. 21a. Once again, the district court ignored the damage to federalism that results from requiring a state to seek preclearance when such is not required. Moreover, the Court ignored the fact that the delay caused by the preclearance process would adversely affect the ability of the Commissioner to correct serious problems in a school district. This Court ruled in *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992) that "[c]hanges which affect only the distribution of power among officials are not subject to § 5 because such changes have no direct relation to, or impact on, voting." *Id.* at 506. That is precisely what the Texas Legislature has done in §§ 39.131(a)(7), (a)(8), and (e): it has authorized the Commissioner to appoint, for a limited time period, a master or management team with circumscribed powers to address grievous problems that adversely affect the education of the children in the troubled school district.

DOJ's over-expansive and unsupportable application of § 5 of the Voting Rights Act in this case interferes with, and disrupts, this system of accountability. In essence, DOJ's

position, if upheld, will have a predictable result: the denigration of federalism by this unwarranted intrusion into the "routine matters of [state] governance." *Presley*, 502 U.S. at 507.

In short, the district court's opinion simply begged the question; it assumed that voting rights were involved:

> Congress has made the decision that the protection of voting rights outweighs any other State concerns. It is Congress which has struck the balance in favor of preclearance to protect voting interest over school district changes to improve the education process.

J.S. App. 21a.

Moreover, the district court did not address Texas' claim that actions taken pursuant to the Improving America's Schools Act, 20 U.S.C. § 6301 *et seq.*, as modified under the waiver authority of the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891(e) ("Ed-Flex"), do not require preclearance. The federal government, through its Department of Education, contributes funding to Texas public schools. In return for accepting those funds, the State agrees to abide by the requirements of federal education law. Texas has done this. Moreover, Texas is one of the few states that is an Educational Flexibility Partnership state. As such, it has opted, pursuant to federal law, to utilize its own accountability measures rather than the federal ones.[21]

Texas asks this Court to reverse the judgment of the court below and to render a decision on the merits: one that declares that §§ 39.131(a)(7), (a)(8), as limited by (e), are not

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[21] But for the fact that it is an Educational Flexibility Partnership state, Texas would be obligated under federal law to impose sanctions on deficient school districts under circumstances delineated by federal education law.

changes affecting voting and, therefore, do not have to be submitted for preclearance under § 5 of the Voting Rights Act.[22]

ARGUMENT

I.

TEXAS' CLAIMS ARE RIPE FOR JUDICIAL REVIEW

The district court dismissed Texas' claim on the grounds that it did not meet either the constitutional or prudential requirements of ripeness. The district court erred in that determination.

A. Article III Ripeness Exists

Although the district court ruled that the State's claims were not ripe for judicial decision under Article III, the essence of the ruling was that the State had no standing to sue on these claims. Article III standing exists when a plaintiff can show, first, that he has "suffered an 'injury in fact'--an invasion of a legally protected interest which is (a) concrete and particularized and (b) 'actual or imminent,' 'not conjectural' or

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[22] In *Perkins v. Matthews*, 400 U.S. 379, 386-387 (1971), this Court decided that

> ... in the interest of judicial economy, we shall not remand to the District Court for the making of a properly limited inquiry. The record is adequate to enable us to decide whether the challenged changes should have been submitted for approval and we shall, therefore, decide that question.

Texas asks this Court to follow this procedure in this case.

'hypothetical.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992). Second, "there must be a causal connection between the injury and the conduct complained of--the injury has to be fairly traceable to the challenged action of the defendant, and not ... the result of the independent action of some third party not before the court." *Id.* Third, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.*

The district court premised its conclusion that Article III ripeness did not exist on two of the State's asserted injuries: (1) that the quality of education of all Texas school children would be diminished and (2) that it will suffer an inability to move promptly and efficiently to safeguard the education of its children. Missing from the district court's consideration of the State's injuries was the argument that the State's direct and immediate injury was to its interest in federalism: a right to be free from unwarranted federal interference into "the routine matters of [state] governance." *Presley*, 502 U.S. at 507; Texas' Response to United State's Motion to Dismiss, or, in the Alternative, for Judgment on the Pleadings at 7; Texas' Motion for Summary Judgment at 17; *see generally* Texas' Reply to the Defendant's Opposition to Texas' Motion for Summary Judgment.

This case is similar to *Northeastern Florida Contractors v. Jacksonville*, 508 U.S. 656 (1993). In *Jacksonville*, an equal protection case, this Court ruled that the injury in fact in an equal protection case is the denial of the plaintiff's constitutional right to equal treatment. *Id.* at 666. Similarly, the injury in fact in this case is Texas' constitutional right to be free from unwarranted federal intrusion into routine matters of state governance. In *Allen v. State Board of Elections*, 393 U.S. 544 (1969), this Court recognized the importance of having a dispute over the question of whether a state enactment is subject to § 5 heard by a three-judge panel. *Id.* at 562. It is incomprehensible indeed that this issue, which merits resolution by a three-judge panel, would be deemed by the district court to

be of such little consequence to Texas that its action would be dismissed for lack of standing.

In short, the district court erred. Texas' interest in federalism is a legally protected one under our Constitution. Texas has standing to bring this declaratory action because DOJ's erroneous ruling that §§ 39.131(a)(7), (a)(8), and (e) are subject to preclearance under § 5 made the State's injury concrete, particularized, and actual. That concrete, particularized, and actual injury resulted directly from DOJ's erroneous ruling. A favorable decision from the Court that those provisions are not election related and, therefore, need not be precleared would redress the State's injury. Thus, Article III standing exists.

B. Prudential Ripeness Exists

Prudential ripeness is governed by a two-part test. First, the Court must consider the "fitness of the issue for judicial decision." Second, the Court must consider "hardship to the parties of withholding court consideration." *Abbott Lab. v. Gardner*, 387 U.S. 136, 149 (1967). Consideration of both factors indicates that this case is ripe.

1. The issue whether §§ 39.131(a)(7), (8), and 39.131(e) are changes affecting voting is fit for judicial determination because the issue is a purely legal one.

Ripeness and standing share the constitutional requirement that an injury in fact be certainly impending. Here, the injury in fact is actual. Texas has enacted legislation that DOJ has erroneously deemed to be election related and, therefore, must be precleared. Texas disagrees with DOJ's legal assessment and seeks a determination that this legislation need not be precleared because it is not election related and, therefore, not subject to § 5 of the Voting Rights Act. Texas

asks this Court to construe a statute. Questions of statutory interpretation are independent of any factual dispute. In *Abbott Laboratories v. Gardner*, this Court held that whether the Food and Drug Commissioner had correctly interpreted a statute was fit for judicial determination because the "issue tendered is a purely legal one." 387 U.S. at 149.

Moreover, the impact of the DOJ's decision that the particular placement of a master or a management team must be precleared "is sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage" because the decision "put [the State of Texas] in a dilemma." *Abbott Lab. v. Gardner*, 387 U.S. at 152. Either the State complies with the preclearance requirement wrongfully imposed by DOJ and subjects routine matters of state government--here, the Commissioner's decision to appoint a master or management team to troubled school districts--to federal supervision, or it refuses to comply with the preclearance requirement and risks time consuming litigation that will encumber the State's ability to address problem school districts quickly. *Id.*

Nor must the Court wait until Texas makes a specific placement of a master or management team to ascertain the authority given the master or management team. As discussed below, the limitations on a master's or management team's authority are codified at TEX. EDUC. CODE § 39.131(e). No factual determinations are necessary for a court to decide whether the appointment of a master or management team exercising the limited powers authorized by the statute constitutes a change affecting voting. In short, a court can render a declaratory judgment based on its purely legal assessment that §§ 39.131(a)(7), (a)(8) and (e) are not changes affecting voting subject to § 5 of the Voting Rights Act.

Further, as explained more fully below, Texas' claims under the Improving America's Schools Act, 20 U.S.C. § 6301, *et seq.*, as modified by the Educational Flexibility Partnership Demonstration Act ("Ed-Flex"), 20 U.S.C. § 5801 *et seq.*, are purely legal ones, and not dependent on facts. That issue is

whether the Voting Rights Act applies to state action taken pursuant to a federal statute.

a. The Voting Rights Act covers only changes directly relating to voting.

Congress passed the Voting Rights Act in 1965, to "implement[] Congress' firm intention to rid the country of racial discrimination in voting." *Allen v. State Board of Elections*, 393 U.S. 544, 548 (1969). Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, requires that an affected state[23] or subdivision seek preclearance of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting."

While the scope of § 5 is broad, it is not universal. To some extent, "[e]very decision taken by government implicates voting . . . yet no one would contend that when Congress enacted the Voting Rights Act it meant to subject all or even most decisions of government in covered jurisdictions to federal supervision." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 504 (1992). In *Presley*, this Court noted that "[o]ur cases since *Allen* reveal a consistent requirement that changes subject to § 5 pertain *only* to voting." *Id.* at 502 (emphasis added). Further, the "[c]overed changes must bear a *direct* relation to voting itself." *Id.* at 510 (emphasis added).

In *Presley*, this Court reviewed the history of cases under § 5 of the Voting Rights Act, and identified four types of changes that were covered by § 5:

> First, we have held that § 5 applies to cases like *Allen v. State Board of Elections* itself, in which the changes involved the manner of voting. . .

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[23] Texas is subject to the Voting Rights Act. *See* 42 U.S.C. § 1973b(b). *See also* 28 C.F.R. § 51 app. (1995).

> Second, we have held that § 5 applies to cases like *Whitley v. Williams*, which involve candidacy requirements and qualifications. . . Third, we have applied § 5 to cases like *Fairley v. Patterson*, which concerned changes in the composition of the electorate that may vote for candidates for a given office. . .Fourth, we have made clear that § 5 applies to changes, like the one in *Bunton v. Patterson*, affecting the creation or abolition of an elective office. . .

502 U.S. at 502-503 (citations omitted).

The Court further noted that "[t]he first three categories involve changes in election procedures," while "[t]he fourth category might be termed substantive changes as to which offices are elective." *Id.* The Court refused to extend the reach of the Voting Rights Act to "changes in the routine organization and functioning of government." *Id.* at 504.

b. The provisions authorizing the Commissioner to place a master or management team with circumscribed powers to oversee the operations of a school district for a limited time period are not subject to the Voting Rights Act because they are not a change affecting voting, but simply a change in the routine organization and functions of government.

The provisions of the Texas Education Code providing for the temporary placement of a master or management team do not fall within any of the categories recognized by this Court in *Presley, supra*. First, the provisions have no effect on election procedures. Independent school districts continue to

be governed by an elected board of trustees. TEX. EDUC. CODE § 11.151. Moreover, §§ 39.131(a)(7) and (8) do not change the requirements for candidates to the board, the composition of the electorate that votes for the board, or the manner of voting for the board. TEX. EDUC. CODE § 39.131(e)(3), (4).

Nor do §§ 39.131(a)(7) and (8) constitute "substantive changes as to which offices are elective." *Presley*, 502 U.S. at 503. This category was first described in *Bunton v. Patterson*, 393 U.S. 544 (1969). In *Bunton*, Mississippi amended its statutes to provide that in certain counties, the superintendent of education would no longer be elected, but would be appointed by the board of education. *Allen*, 393 U.S. at 550-551. The Court held that such a change was subject to § 5 preclearance, because it affected the power of a citizen's vote. *Id.* at 569. The voter is "prohibited from electing an officer formerly subject to the approval of the voters." *Id.* at 569-70.

Bunton is distinguishable from this case because §§ 39.131(a)(7) and (8), providing for the temporary placement of a master or management team, do not change an elected office to an appointed one. The elected board of trustees is not being replaced; it continues to exist and to exercise all its authority subject to oversight by a master or a management team with circumscribed power during a limited time period. Voters continue to elect members of the board of trustees just as they did prior to enactment of Chapter 39. *See generally* TEX. EDUC. CODE §§ 11.051-11.063. Instead, §§ 39.131(a)(7), (a)(8) and (e) provide only that certain of the board's responsibilities may be supervised temporarily by a master or management team due to the board's demonstrated inability to correct problems that adversely affect the education of the school children in the district. Indeed, Texas law proscribes a replacement of the board of trustees with a master or management team in the *Bunton v. Patterson* sense, that is, a change from "an elective office to an appointive one." *Presley*, 502 U.S. at 507. Section 11.051(a) of the Texas Education Code specifically states that "[a]n independent school district is

governed by a board of trustees who, as a body corporate, shall oversee the management of the district."

This case is similar to *Presley v. Etowah County Comm'n*, in which this Court held that changes that affect only the allocation of power among governmental officials are not considered changes affecting voting. *Presley*, 502 U.S. at 510. *Presley* involved changes in county commissioners' responsibilities in the Alabama counties of Etowah and Russell. Voters in Alabama counties elected members of county commissions, which were responsible for the maintenance and construction of county roads. In Etowah county, an individual commissioner could at one time authorize expenditures of funds allocated to his district without the approval of the entire commission. In 1987, however, the commission passed a "Common Fund Resolution" which discontinued that practice when it put all monies in a common fund. Similarly, in Russell County, individual commissioners could authorize expenditures for routine maintenance and repair work without approval from the entire commission. This authority was changed in May 1979, when the commission passed a resolution transferring control over road construction, maintenance, personnel, and inventory from the commissioners to the county engineer, a person appointed by the entire commission ("Unit System"). The state legislature later passed legislation implementing both the common fund and the unit system resolutions. Neither the resolutions nor the legislation was submitted for preclearance under § 5.

Several newly elected county commissioners sued, alleging that the counties had violated § 5 by failing to obtain preclearance of these resolutions. This Court disagreed, holding that neither resolution constituted a change affecting voting. With respect to the Common Fund Resolution, the Court noted that "[c]hanges which affect only the distribution of power among officials are not subject to § 5 because such changes have no direct relation to, or impact on, voting." 502 U.S. at 506. In addressing the transfer of power from the elected

official to the appointed county engineer, the Supreme Court distinguished *Bunton*, because the Unit System did not abolish an elective office, but merely transferred authority from an elected office to an appointed one. *Presley*, 502 U.S. at 506, 507.

Like the Common Fund Resolution in *Presley*, the provisions of Chapter 39 of the Texas Education Code allowing for the temporary placement of a master or management team have no direct relation to voting. In words directly applicable to this case:

> It has no connection to voting procedures: It does not affect the manner of holding elections, it alters or imposes no candidacy qualifications or requirements, and it leaves undisturbed the composition of the electorate. It also has no bearing on the substance of voting power, for it does not increase or diminish the number of officials for whom the electorate may vote. Rather, the [temporary appointment of either a master or management team with limited powers] concerns the internal operations of an elected body.

Presley, 502 U.S. at 503.

Like the Unit System in *Presley*, the temporary placement of a master of management team does not replace an elected official with an appointed one:

> [I]t might be argued that the delegation of authority to an appointed official is similar to the replacement of an elected official with an appointed one, the change we held subject to § 5 in *Bunton v. Patterson*. This approach, however, would ignore the rationale for our holding: '[A]fter the change, [the citizen] is

> prohibited from electing an officer formerly subject to the approval of the voters.' ... In short, the change in *Bunton v. Patterson* involved a rule governing voting not because it affected a change in the relative authority of various governmental officials, but because it changed an elective office to an appointive one.

Presley, 502 U.S. at 506-507 (citation omitted).

Even where a master or management team is placed, the elected board of trustees remains in existence and retains "substantial authority," including the power to set the total amount of the budget. TEX. EDUC. CODE § 39.131 (e)(3)-(6).[24] In addition, the transfer of authority to a master or management team is temporary. The elected board of trustees is not displaced during the time the master or management team is in place. A portion of their responsibilities is supervised by the master or management team for a limited time period until the problem is corrected. Moreover, under § 39.131(e), the Commissioner must evaluate the continued need for the master or management team every 90 days. Unless that evaluation indicates that continued appointment is necessary for effective governance of the district or delivery of instructional services, the appointment of the master or management team must be terminated. *Id.* Finally, a party that disagrees with the Commissioner's temporary appointment of either a master or management team with limited powers has a right to appeal the Commissioner's action to the district court of Travis County. TEX. EDUC. CODE § 7.057(d).

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[24] As did the Russell County Commission in *Presley*, the school board "retains substantial authority, including the power . . . to set . . . [the total amount of its] budget." 502 U.S. at 493.

DOJ concluded that §§ 39.131(a)(7) and (a)(8) as limited by § 39.131(e) are changes affecting voting that need to be precleared every time the Commissioner decides to utilize either provision. In so concluding, DOJ determined that the limitations of § 39.131(e) on the appointment of a master or management team "do not exempt the State from the holding in *Casias v. Moses*, because S.B. 1 still potentially allows for the 'takeover' of a school board such that the board cannot perform the functions that are its 'reason for being,'" *citing State of Texas v. United States*, 866 F.Supp. 20, 26 (D.C.C. 1994). J.S. App. 37a. DOJ's conclusion is incorrect for three reasons. First, the limitations contained in § 39.131(e) do not allow for a "takeover" of a school board, if by "takeover" is meant a permanent replacement of the elected school board with an appointed master or management team. Such a permanent replacement would violate Texas law. TEX. EDUC. CODE § 11.051(a) ("An independent school district is governed by a board of trustees who, as a body corporate, shall oversee the management of the district.").

Second, the court in *Casias* did not ever reach a decision on the merits concerning the predecessor provision, Chapter 35. Rather the court enjoined the State from appointing a management team, holding only that "the Court will grant the motion for preliminary injunction at this time and reserve a final determination on the merits until the parties have had an opportunity to fully present their views." Jt. App. 29. After the legislature repealed Chapter 35 and passed Chapter 39, and DOJ precleared §§ 39.131(a)(7) and (a)(8) as enabling legislation, the court dismissed the action as moot. Jt. App. 43-44. Thus, *Casias* does not bind the State as DOJ incorrectly asserted in its preclearance letter.

Finally, DOJ's "reason for being" standard has never been sanctioned by this Court.[25] Under this standard, any "change in the relative authority of various governmental officials" would be deemed to be election related. This result contradicts this Court's holding in both *Bunton v. Patterson*, 393 U.S. 544 (1969) and *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992). The *Presley* Court explained that the change in *Bunton* "involved a rule governing voting not because it affected a change in the relative authority of various governmental officials, but because it changed an elective office to an appointive one." *Presley*, 502 U.S. at 506-507. Moreover, Texas law establishes a school board's "reason for being." Section 11.002 of the Texas Education Code states that "the school districts ... created in accordance with the laws of this state have the primary responsibility for implementing the state's system of public education and ensuring student performance in accordance with this code." Moreover, § 11.011 requires that "[t]he board of trustees of an independent school district, the superintendent of the district, the campus administrators, and the district--and campus--level committees ... shall contribute to the operation of the district in the manner provided by this code and by the board of trustees of the district in a manner not inconsistent with this code." If anything, the sanction provisions at issue assist the troubled school boards

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[25] The page cite to which DOJ refers in *State of Texas v. United States* reads as follows:

> Defendants assert that one simple fact compels this conclusion: There is only one Aquifer and its regulation is the "reason for being" for both of these boards. United States' Memorandum in Opposition to Texas' Motion for Summary Judgment at 14.

866 F.Supp. at 26. The court in *State of Texas v. United States* says nothing further about the use of the term "reason for being."

accomplish the goals that are their "reason for being:" to operate the school districts in a manner consistent with Texas law.

c. The principles of federalism support the conclusion that the temporary placement of a master or management team is not a change affecting voting.

Texas has enacted Chapter 39 of the Texas Education Code to fulfill its important responsibility to educate the children of the State. The sanctions provided in § 39.131(a), including the temporary placement of a master or management team, are intended to provide Texas with controls necessary to effectuate that responsibility.

Since § 5 of the Voting Rights Act was first held to be constitutional, members of this Court have expressed concern that it infringes upon the rights of states to govern their own affairs:

> Section 5, by providing that some of the States cannot pass state laws or adopt state constitutional amendments without first being compelled to beg federal authorities to approve their policies, so distorts our constitutional structure of government as to render any distinction drawn in the Constitution between state and federal power almost meaningless.

South Carolina v. Katzenbach, 383 U.S. 301, 358 (1966) (Black, J., concurring and dissenting).

Recognizing this concern, the Court has restricted the scope of § 5 and has refused to extend it to "changes in the routine organization and functioning of government." *Presley*, 502 U.S. at 504. Education is a traditional function of state government. Congress has recently affirmed this basic precept

in the Goals 2000: Educating America Act, 20 U.S.C. §§ 5801 *et seq.*: "[I]n our Federal system the responsibility for education is reserved respectively to the states and the local school systems and other instrumentalities of the states." 20 U.S.C. § 5899(a)(3). To require Texas to preclear modest legislative efforts to safeguard the education of its children extends the Voting Rights Act into an area where it was never contemplated to be used:

> By requiring preclearance of changes with respect to voting, Congress did not mean to subject such routine matters of governance to federal supervision. Were the rule otherwise, neither state nor local governments could exercise power in a responsible manner within a federal system.
>
> ****
>
> If federalism is to operate as a practical system of governance and not a mere poetic ideal, the states must be allowed both predictability and efficiency in structuring their governments. Constant minor adjustments in the allocation of power among state and local officials serve this elemental purpose. Covered changes must bear a direct relation to voting itself . . .

Presley, 502 U.S. at 507-510. Here, the appointment of a master or management team bears "[no] direct relation to voting itself." *Id.* Rather, it is a minor, albeit episodic, adjustment in the allocation of power among state and local officials.

d. Federal law authorizes states, including Texas, to take corrective action against local school districts that are not meeting state educational goals.

The language of the Voting Rights Act, including § 5, makes clear that Congress intended that it apply only to affected states and subdivisions.[26] It does not apply to acts passed by the federal government.

In 1994, Congress passed the Improving America's Schools Act, 20 U.S.C. § 6301 *et seq.* This Act revised, strengthened, and improved the Elementary and Secondary Education Act of 1965. In its declaration of policy, Congress emphasized the importance of education:

> The Congress declares it to be the policy of the United States that a high-quality education for all individuals and a fair and equal opportunity to obtain that education are a societal good, are a moral imperative, and improve the life of every individual, because the quality of our individual

[26] Section 1973c of the Voting Rights Act provides in part that:

> [n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be *imposed or applied by any State or political subdivision* in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color. . .

42 U.S.C. § 1973c (emphasis added). Section 5 requires that an affected state or subdivision seek preclearance of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting."

> lives ultimately depends on the quality of the lives of others.

20 U.S.C. § 6301(a)(1). J.S. App. 64a. In the Improving America's Schools Act, Congress authorized additional funds to help disadvantaged children meet enhanced educational standards. 20 U.S.C. §§ 6301(d), 6302. To be eligible for these funds, states are required to design both challenging performance standards and assessment systems to measure children's achievement under these standards. 20 U.S.C. § 6311(b); J.S. App. 69a-76a.

States receiving funds under this Act must measure students' performance. To assure progress towards educational goals, the Act specifically requires a state to identify any local educational agency[27] that fails to make adequate progress towards meeting the state's student performance standards for two years. 20 U.S.C. § 6317(d)(3)(A)(i); J.S. App. 82a. After a local educational agency has been so identified, the state may take corrective action against that local educational agency. 20 U.S.C. § 6317(d)(6)(A); J.S. App. 84a-86a. The state *must* take such action against an identified local educational agency that fails to make adequate progress after four years. *Id.*

Corrective actions range in severity, and may include (1) the withholding of funds; (2) reconstitution of school district personnel; (3) removal of particular schools from the jurisdiction of the local educational agency and establishment of alternative arrangements for public governance and supervision of such schools; (4) *appointment by the state educational agency of a receiver or trustee to administer the affairs of the local educational agency in place of the superintendent and*

[27] 20 U.S.C. § 5802(a)(6) provides that the definitions of the terms "local educational agency" and "state educational agency" are found at 20 U.S.C. §§ 8801(18)(A) and 8801(28), respectively. A Texas school district is a local educational agency. The Texas Education Agency, headed by the Commissioner of Education, is the state educational agency for the State.

school board; (5) the abolition or restructuring of the local educational agency; (6) the authorizing of students to transfer from a school operated by one local educational agency to a school operated by another local educational agency; and (7) a joint plan between the state and the local educational agency that addresses specific elements of student performance problems and that specifies state and local responsibilities under the plan. 20 U.S.C. § 6317(d)(6)(B)(i)(I)-(VII) (emphasis added). J.S. App. 84a-85a.

Federal law, therefore, requires states to take corrective action against local educational districts under certain circumstances. The corrective actions authorized under federal law are similar to the sanctions authorized by § 39.131(a) of the Texas Education Code. In fact, federal law allows for the *replacement* of a school board, as well as abolition of a school district, both of which are more draconian then the modest sanctions at issue here. 20 U.S.C. § 6317(d)(6)(B)(i)(V), (VI); J.S. App. 85a. If a school district fails to make adequate progress towards meeting the state's educational performance standards, both the Texas and federal statutes provide for the appointment of a receiver or trustee to administer the affairs of a school district.

e. Federal law authorizes Ed-Flex Partnership states, including Texas, to substitute their accountability regulations for those of the federal statutes.

Further, Congress has recently passed legislation which enables states to substitute their own assessment and accountability provisions for those of the federal statutes. In 1994, Congress passed the Educational Flexibility Partnership Demonstration Act ("Ed-Flex") as part of the Goals 2000: Educating America Act ("Goals 2000"), 20 U.S.C. § 5801 *et seq*. The Goals 2000 Act is intended to promote educational

reform leading to improved educational outcomes by, among other things, "encouraging and enabling all State educational agencies and local educational agencies to develop comprehensive improvement plans. . ." 20 U.S.C. § 5801(6)(C); J.S. App. 50a.

In the Goals 2000 Act, "Congress agrees and reaffirms that the responsibility for control of education is reserved to the States and local school systems and other instrumentalities of the States. . ." 20 U.S.C. § 5899(b). Moreover, the Act expressly provides that the federal government shall take no action under the Act "which would reduce, modify, or undercut State and local responsibility for control of education." *Id.*

This emphasis on state control of education is further demonstrated by the Ed-Flex portion of the Act. 20 U.S.C. § 5891; J.S. App. 52a-63a. Ed-Flex provides that the Secretary of Education may authorize state educational agencies in eligible states to waive federal statutory or regulatory requirements applicable to certain federal programs. 20 U.S.C. § 5891(e)(2); J.S. App. 57a. One of the programs whose statutory requirements can be waived is Title I of the Elementary and Secondary Education Act of 1965, 20 U.S.C. § 6301 *et seq.*, which includes the corrective actions discussed above. 20 U.S.C. § 5891(b)(1); J.S. App. 55a.

A state may apply to become an Ed-Flex Partnership state. 20 U.S.C. § 5891(e)(4)(A); J.S. App. 58a-59a. If a state is designated as an Ed-Flex partner, it may waive federal education regulations and statutory requirements, and replace them with its own regulations. 20 U.S.C. § 5891(e)(4)(B)(ii); J.S. App. 59a. Federal regulations that may be waived include those pertaining to accountability. 20 U.S.C. § 5891(b)(1); J.S. App. 55a.

Texas has been selected as one of seven Ed-Flex Partnership states, allowing it to waive certain provisions of federal law, including the corrective actions listed in Title I of the Elementary and Secondary Education Act of 1965. 20 U.S.C. § 6317(d)(6)(B)(i)(I)-(VIII); J.S. App. 84a-85a. *See*

Letter from Richard W. Riley, Secretary, United States Department of Education, to Michael A. Moses, Commissioner of Education, with attachments (Jan. 26, 1996); J.S. App. 39a-48a. In his letter selecting Texas as an Ed-Flex Partnership state, Secretary Riley noted that "Texas has demonstrated its commitment to promoting flexibility, accountability, and effective innovation in order to improve teaching and learning." J.S. App. 39a. Secretary Riley further expressed "confiden[ce] that Texas, as an Ed-Flex Partnership state, will exercise its authority in a manner that furthers the objectives of its comprehensive plan for educational improvement and provides accountability for results." *Id.*

Texas has used the Ed-Flex waiver process to conform the federal grant of authority for corrective actions to the provisions of its state authorization under Chapter 39 of the Texas Education Code. Thus, Texas has *pursuant to federal authorization* precisely the same authority it enjoys under state law. In conforming the federal grant of corrective action authority to Chapter 39, Texas also adopted the limits on the authority of a master or management team precluding any action affecting voting or elections found at § 39.131(e); J.S. App. 91a-92a.

Because a federal statute authorizes Texas to use its own accountability program, the Voting Rights Act does not apply to actions taken pursuant to that accountability program. To hold otherwise would subvert the intent of the Voting Rights Act and apply it in a manner never contemplated by Congress. To hold otherwise would prevent Texas from exercising its power in a responsible manner within the federal system, and would defeat the purpose of the federal education statutes. The power to appoint a master or management team would most often be invoked in emergency situations where swift action is required to protect the education of Texas children. In the time it takes to seek and obtain preclearance, the master or management team could have been appointed, corrected the

problem, and been removed.[28] To require Texas, unlike states not covered by the Voting Rights Act, to seek preclearance in these situations could result in the very harm to education that the federal statutes are intended to prevent.

2. Hardship to the parties

Texas satisfies the "hardship" prong of the *Abbott Laboratories* test because Texas' hardship is the heavy cost to "our federalism" that inures by having DOJ insinuate itself into routine matters of state governance that have nothing to do with election changes. *Younger v. Harris*, 401 U.S. 37, 44-45 (1971). Because § 5 of the Voting Rights Act imposes a heavy burden on state sovereignty, *Allen v. State Board of Elections*, 393 U.S. 544, 556 (1969) ("Congress . . . drafted an *unusual*, and in some respects a *severe*, procedure for insuring that states would not discriminate on the basis of race in the enforcement of their voting laws" (emphasis added)), states are not required to seek preclearance if the legislation at issue does not affect voting. "Section 5 [of the Voting Rights Act] is unambiguous with respect to the question whether it covers changes other than changes in rules governing voting: It does not." *Presley v. Etowah County Comm'n*, 502 U.S. 491, 509 (1992). This Court should not allow DOJ's erroneous determination as to the scope of § 5 of the Voting Rights Act to stand.

Moreover, this Court's holding in *Morris v. Gressette*, 432 U.S. 491(1977) does not preclude judicial resolution of this

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[28] For instance, in the recent situation involving the Wilmer-Hutchins school district, Texas sought to preclear placement of a management team on March 10, 1996. Sixty days later, on May 10, 1996, the DOJ sought additional information. DOJ finally precleared the placement on June 6, 1996, on an "expedited" basis, approximately ninety (90) days after Texas sought preclearance. During that time, both the Internal Revenue Service and the Federal Bureau of Investigation had raided the district's offices to investigate financial wrongdoing.

issue. In *Gressette*, this Court held that the Attorney General's failure to object timely to a state's reapportionment plan could not "be questioned in a suit seeking judicial review of the Attorney General's exercise of discretion under § 5 or his failure to object within the statutory period." *Id.* at 506-507. This Court reasoned in so holding that "where the discriminatory character of an enactment is not detected upon review by the Attorney General, it can be challenged in traditional constitutional litigation." *Id.* at 506-07.

This case differs from *Gressette* in several important respects. First, in *Gressette* no one disputed that the state redistricting legislation involved there was a change affecting voting. Here, the gravamen of the dispute concerns Texas' disagreement with DOJ that §§ 39.131(a)(7), (a)(8), and (e) are changes affecting voting.

Second, without judicial review, an erroneous determination by DOJ that a state statute is a change affecting voting would never be corrected. In essence, DOJ could expand the boundaries of § 5 by broadly defining a change affecting voting and requiring a state to submit the statutory provisions for administrative preclearance. In *Gressette*, the Court reasoned that DOJ's erroneous failure to object to legislation that affected voting could be judicially corrected in a later suit. Here, no such safeguard would exist without recourse to judicial review.[29]

Third, the severe nature of the § 5 remedy supports judicial resolution. The *Gressette* Court acknowledged "that Congress intended to provide covered jurisdictions with an

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[29] In fact, DOJ argued to the district court that it (the district court) could not unpreclear the Attorney General's administrative decision to preclear Chapter 39 of the Texas Education Code as enabling legislation. United States' Memorandum in Support of Motion to Dismiss, or in the Alternative, for Judgment on the Pleadings at 10. Apparently, DOJ would be very content on being the only arbiter of whether a state provision is a change affecting voting.

expeditious alternative to declaratory judgment actions" by allowing covered jurisdictions the option of pursuing the ostensibly quicker route of administrative preclearance by the Attorney General. *Gressette*, 432 U.S. at 504. However, Congress certainly could not have intended to deny states the opportunity to have the issue of whether a statutory provision is a change affecting voting decided by the courts as opposed to DOJ. Without a judicial determination that the statute is not subject to the Voting Rights Act, Texas will be obliged to submit any temporary placements of a master or management team for preclearance. Texas would be denied its right to administrate the education of Texas' children, a matter firmly within the ambit of state regulation, unencumbered by unwarranted intrusion by DOJ.

This case is similar to *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992), in which this Court refused to defer to the DOJ's interpretation of the scope of § 5. In *Presley*, the Court considered whether the permanent delegation of authority from an elected to a appointed official constituted a change with respect to voting. The DOJ argued that it did, and urged the Court to defer to the DOJ's administrative construction of § 5. This Court refused to do so. Noting that "[d]eference does not mean acquiescence," *id.* at 508, this Court emphasized that Congress' intent as to the scope of § 5 is unambiguous: § 5 applies *only* to changes affecting voting. *Id.* at 509 (emphasis added).

This Court has recently expressed concern about DOJ's expansive interpretation of § 5 of the Voting Rights Act. In *Miller v. Johnson*, 115 S. Ct. 2475 (1995), the Court refused to accord deference to DOJ's interpretation of the scope of § 5 of the Voting Rights Act, noting that DOJ's "maximization policy requiring States to create majority-minority districts wherever possible," was far removed from "the purpose of § 5." *Id.* at 2493.

In a case decided last term, Justice Thomas emphasized the importance of independent judicial examination of cases under § 5:

> Section 5 sets up alternative routes for preclearance, and the primary route specified is through the District Court for the District of Columbia, not through the Attorney General's office. See 42 U.S.C. § 1973c (generally requiring District Court preclearance, with a proviso that covered jurisdictions may obtain preclearance by the Attorney General in lieu of District Court preclearance, but providing no authority for the Attorney General to preclude judicial preclearance.) Requiring the District Court to defer to adverse preclearance decisions by the Attorney General based upon the very preclearance standards she articulates would essentially render the independence of the District Court preclearance route a nullity.

Reno v. Bossier Parish School Bd., 117 S.Ct. 1491, 1504 (1997) (Thomas, J., concurring). While *Bossier Parish* involved a question of whether a redistricting plan should be precleared under § 5, there is an even greater need for independent judicial determination of whether a state enactment is subject to § 5 preclearance at all. A state should not be required to seek administrative preclearance of a specific placement of a monitor or management team before it can obtain a judicial determination of whether the statute in question is a change affecting voting. Such a result would hamper state sovereignty and violate fundamental tenets of federalism. As in *Miller*, the federalism costs exacted by § 5 preclearance can not be justified under the circumstances of this case. *Miller*, 115 S.Ct. at 2493.

CONCLUSION

For the reasons stated, Texas asks this Court to reverse the judgment of the court below and to render a decision on the merits: one that declares that TEX. EDUC. CODE §§ 39.131(a)(7), (a)(8), as limited by (e), are not changes affecting voting and, therefore, do not have to be submitted for preclearance under § 5 of the Voting Rights Act.

Respectfully submitted,

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November 1997

No. 97-29

In the Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF TEXAS, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

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54 pp

QUESTIONS PRESENTED

1. Whether a three-judge district court for the District of Columbia has jurisdiction under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, to hear and decide a declaratory judgment action brought by a jurisdiction covered under the Act solely for the purpose of determining whether potential action authorized by a state enabling statute would be a change with respect to voting covered by the Act requiring preclearance.

2. Whether appellant's claim, that potential action by state education officials to impose sanctions on local school districts authorized by a state enabling statute would not require preclearance under Section 5, presents a ripe controversy, when appellant has taken no action under the enabling statute.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-29

STATE OF TEXAS, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The amended opinion and order of the three-judge district court (J.S. App. 13a-23a, 24a-25a) are unreported.

JURISDICTION

The initial judgment of the district court was entered on March 5, 1997, and an amended judgment was entered on March 17, 1997. A notice of appeal was filed on April 23, 1997 (J.S. App. 26a-27a), and a supplemental notice of appeal was filed on May 12, 1997 (J.S. App. 28a-29a). The jurisdictional statement was filed on June 23, 1997. This Court noted probable jurisdiction on September 29, 1997. The jurisdiction of this Court rests on 42 U.S.C. 1973c.

STATEMENT

1. Section 5 of the Voting Rights Act of 1965 (Act), 42 U.S.C. 1973c, provides that, whenever a jurisdiction covered under the Act "shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect" on the date of coverage, the jurisdiction may not enforce the new practice "unless and until" it obtains a declaratory judgment from the United States District Court for the District of Columbia that the new practice "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race." Alternatively, the covered jurisdiction may enforce the new practice without resort to the judicial declaratory-judgment proceeding if it submits the new practice to the Attorney General for review and receives no objection to the practice from the Attorney General within 60 days thereafter, or if the Attorney General makes clear that she does not object to the practice. *Ibid.*; see generally *Clark* v. *Roemer*, 500 U.S. 646, 648-649 (1991). The process of seeking a declaratory judgment from the United States District Court for the District of Columbia is commonly referred to as "judicial preclearance"; the submission of a change to the Attorney General for review is commonly referred to as "administrative preclearance." See *ibid.* The Act does not require a covered jurisdiction to submit a new enactment to the Attorney General for preclearance; "[t]he provision for submission to the Attorney General merely gives the covered [jurisdiction] a rapid method of rendering a new state election

law enforceable." *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 549 (1969).

2. Texas is a covered jurisdiction under Section 5. See 28 C.F.R. Pt. 51 App. Local school boards in Texas are elected by the voters of the district. Tex. Educ. Code Ann. §§ 11.051-11.063 (West 1996 & Supp. 1998); J.S. App. 89a. In 1993, the Texas legislature enacted provisions designed to make local school boards accountable to the State for their performance and that of their students. See App. Br. 4.[1] The legislature authorized the State Commissioner of Education (Commissioner), in certain circumstances, to assume authority over local school districts by, among other things, appointing a management team to oversee the operations of a school system. J.A. 22-23. Under the 1993 legislation, a management team appointed by the Commissioner was empowered to "direct an action to be taken by the principal of a campus, the superintendent of the district, or the board of trustees of the district," and to "approve or disapprove any action" by a principal, superintendent, or board of trustees. J.A. 23.

In 1995, the Commissioner appointed a management team to oversee the operations of the Somerset Independent School District. See J.A. 24; *Casias* v. *Moses*, No. SA-95-CA-0221 (W.D. Tex. May 11, 1995) (J.A. 20-30), dismissed as moot (W.D. Tex. Jan. 16, 1996) (J.A. 42-49). The Commissioner gave that team "broad authority," including power to veto actions of the elected Board. J.A. 27. Neither the Texas Education Agency nor the Commissioner gave "any indication of

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[1] "App. Br." refers to the brief for appellant; "Amici Br." refers to the brief for amici Washington Legal Foundation, *et al.*

how long the management team [might] be in place." J.A. 25.

Texas did not submit either the 1993 legislation or the 1995 appointment of the management team for the Somerset school district to the Attorney General for preclearance, having taken the position that neither the enactment of the legislation nor its implementation was a change affecting voting that would require preclearance. J.A. 22. Nor, for the same reason, did Texas seek judicial preclearance in the United States District Court for the District of Columbia. Private plaintiffs and the United States brought suit under Section 5 in a local three-judge district court for the Western District of Texas to enjoin the appointment of the management team to oversee the operations of the Somerset school district, contending that the appointment was covered by Section 5 but had not been judicially or administratively precleared in conformity with the Act.

On May 11, 1995, the district court in Texas entered a preliminary injunction against the implementation of the state officials' plan for a management team to oversee the operations of the Somerset school district. See J.A. 20-30. In explaining that the plaintiffs were likely to succeed on the merits, the court stressed that the 1993 legislation permitted the State to "appoint a management team that can completely usurp the function of the Somerset I.S.D. Board of Trustees." J.A. 27. Noting that this Court had already concluded that "the replacement of an elected office with an appointed one is a change subject to preclearance under § 5," *ibid.* (citing *Allen*, 393 U.S. at 569-570), the district court reasoned that the appointment of a management team to oversee the operations of a local school district may well "rise to

the level of a *de facto* replacement of an elective office with an appointive one" and thus require preclearance under Section 5, see J.A. 27-28 (quoting *Presley* v. *Etowah County Comm'n*, 502 U.S. 491, 508 (1992)).

3. Shortly thereafter, the Texas legislature repealed the 1993 authorizing statute, and enacted in its stead the authorizing provisions that are now at issue in this case. (The *Casias* litigation was then dismissed as moot, J.A. 42-49.) The newly enacted Chapter 39 of the Texas Education Code gives the Commissioner authority to impose a variety of sanctions, in increasing order of severity, on local school districts. See Tex. Educ. Code Ann. § 39.131(a) (West 1996); J.S. App. 90a-91a.

The first six sanctions made available to the Commissioner include mild interventions such as ordering preparation of a student achievement improvement plan (§ 39.131(a)(3)) and arranging an on-site investigation of the school district (§ 39.131(a)(5)). Those provisions do not fundamentally affect the authority of the elected school board and therefore clearly do not affect "voting" within the meaning of the Voting Rights Act. Two provisions of Chapter 39, by contrast, do affect voting (and appellant does not contend otherwise). The first of those, § 39.131(a)(9), authorizes the Commissioner to "appoint a board of managers * * * to exercise the powers and duties of the board of trustees" of a school district. The second, § 39.131(a)(10), provides that the Commissioner may annex the school district to one or more adjoining districts or ask the State Board of Education to revoke a school district's home-rule charter. See J.S. App. 91a.

Chapter 39 makes two further kinds of sanctions available to the Commissioner; the potential effects of

those sanctions are central to the dispute in this case. Section 39.131(a)(7) permits the Commissioner to appoint a master to "oversee" the operations of a school district. Section 39.131(a)(8) authorizes the Commissioner to appoint a management team to "direct" the operations in areas of unacceptable performance. See J.S. App. 90a-91a.

When the Commissioner assumes authority under subsections (7) and (8), he must "clearly define the powers and duties of a master or management team" appointed pursuant to these provisions. § 39.131(e). As was the case under the 1993 legislation, Chapter 39 states that a master or management team may "direct an action to be taken" by a principal, superintendent, or board of trustees (§ 39.131(e)(1)), and may "approve or disapprove any action" by those officials (§ 39.131(e)(2)). Thus, a master or management team could, at least if so authorized by the Commissioner, annul policies of the elected school board in areas such as curriculum and personnel. The Commissioner may not, however, give the master or management team the power to take any action concerning a district election, to change the number of members or method of selecting the board, to set a tax rate, or to adopt a budget different from the one previously adopted by the elected board. § 39.131(e)(4)-(6); see J.S. App. 91a-92a.

The Commissioner must review the need for the master or management team at least every 90 days, and must remove the master or management team "unless [he] determines that continued appointment is necessary for effective governance of the district or delivery of instructional services." § 39.131(e). Should the Commissioner conclude that such a continued appointment is necessary, however, no

maximum time limit is imposed on the tenure of a master or management team.

The design of Chapter 39, and the policy of the state agency implementing it, are that more limited interventions shall be attempted before the appointment of a master or management team is considered. See App. Br. 9 ("[State] policy requires first the imposition of sanctions that do not include the appointment of a master or management team."). In fact, "most interventions begin and end" with sanctions that do not involve the assumption of direct authority over a school district by the Commissioner, through a master or management team. *Id.* at 9-10.

4. Although the State initially maintained that none of the sanctions available under Section 39.131, except Section 39.131(a)(10), affects voting within the meaning of Section 5, the State submitted all of Chapter 39 to the Attorney General for preclearance on June 12, 1995. J.S. App. 30a-34a. On August 14, 1995, the Assistant Attorney General[2] requested further information with respect to the roles of various state bodies in "the decision to investigate and/or replace an elected or consolidated school board with an appointed master, team, board, etc." J.A. 39. While taking issue with the Assistant Attorney General's "characterization of sanctions under section 39.131 as a 'replacement' of an elected school board" (J.S. App. 96a), and emphasizing limits that Chapter 39 places on the authority of masters and management teams (*id.* at 99a), the State explained that "[t]he actual authority granting a specific master or team * * * is set by

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[2] The authority for determinations under Section 5 has been delegated to the Assistant Attorney General for the Civil Rights Division. 28 C.F.R. 51.3.

the Commissioner at the time of appointment depending on the needs of the district" (*ibid.*).

5. On December 11, 1995, the Assistant Attorney General concluded that sanctions under Section 39.131(a)(1)-(6) do not affect voting and therefore do not require preclearance. J.S. App. 36a. He also precleared Section 39.131(a)(7)-(10) insofar as those provisions were "enabling in nature." *Ibid.*[3] The Assistant Attorney General cautioned, however, that, with regard to those provisions, "under certain foreseeable circumstances their implementation may result in a violation of Section 5." *Ibid.* In particular, he noted:

> [I]nsofar as [Chapter 39] authorizes the Texas Education Agency to do the following: appoint a master, management team, or board of managers that will exercise a school board's powers; annex one school district to another; and revoke the charter of a home-rule school district, it clearly contains voting changes. In particular, [Chapter 39] retains the exact language [that the district court] in *Casias* v. *Moses* * * * found "could result in the replacement of the elected Board with the appointed management team."

Id. at 36a-37a (citations omitted).

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[3] Under the Attorney General's procedures for preclearance submissions under Section 5, when legislation enables a State to institute a voting change in the future, "the failure of the Attorney General to interpose an objection does not exempt from the preclearance requirement the implementation of the particular voting change that is enabled * * * unless that implementation is explicitly included and described in the submission of such parent legislation." 28 C.F.R. 51.15(a).

The Assistant Attorney General acknowledged that the 90-day reevaluation requirement and the restrictions on powers over elections, taxes, and budgets had narrowed the scope of the mandate that the Commissioner could give any master or management team. J.S. App. 37a. He concluded nonetheless that the remaining powers made available to a master or management team under Chapter 39 "still potentially allow[] for the 'take-over' of a school board such that the board cannot perform the functions that are its 'reason for being.'" *Ibid.* (citation omitted). He therefore stated that preclearance would be required if the State actually sought to administer "any voting change made pursuant to Chapter 39—including but not limited to the replacement, *de facto* or otherwise, of an elected school board by an appointed master[,] management team, or board of managers, the annexation of one school district to another, and the revocation of a home-rule school district's charter." *Id.* at 37a-38a.

6. On June 7, 1996, appellant filed a complaint in the United States District Court for the District of Columbia, seeking a declaration that Section 5 does not apply to the sanctions authorized by Section 39.131(a)(7) and (8), because those sanctions are not changes with respect to voting. J.A. 13-14. In addition, appellant contended, the sanction provisions in question do not require preclearance because they are consistent with conditions attached to grants of federal financial assistance to education authorities, which authorize and require the imposition of sanctions to ensure the accountability of local education authorities. J.A. 13. Appellant alleged that the district court had jurisdiction under Section 5 and under the general federal-question statute, 28 U.S.C. 1331.

J.A. 6. Appellant requested that a three-judge court be convened pursuant to 28 U.S.C. 2284 and 42 U.S.C. 1973c. J.A. 7. In its answer, the United States did not contest the allegation that jurisdiction in the district court was based on Section 5, nor did it object to the convening of a three-judge court to hear and decide the matter. See J.A. 15.

The district court convened a three-judge panel. Appellant moved for summary judgment; the United States opposed that motion. The United States also moved to dismiss the case as unripe and, in the alternative, moved for judgment on the pleadings on the basis that, absent more significant limitations upon the authority of masters and management teams, the disputed provisions constitute voting changes subject to the requirement of preclearance under Section 5.

7. The district court granted the United States' motion to dismiss on ripeness grounds. J.S. App. 13a-23a. The court initially observed that this action "does not fit neatly into the statutory framework of section 5," for it "does not fall clearly" into any category of suit contemplated by Section 5. *Id.* at 16a. The court noted that this is not a suit by a covered jurisdiction for preclearance of the pertinent legislation, an injunctive action brought by voters to block implementation of an unprecleared change, or an enforcement action against unprecleared changes brought by the United States. *Ibid.* Rather, appellant "seeks a blanket determination that any action pursuant to the Commissioner's new authority under Chapter 39 would not be a change covered by section 5." *Id.* at 16a-17a. "The statutory basis for jurisdiction over such an action is unclear," stated the court, and "[e]ven if a statutory basis for jurisdiction exists,

however, it is unclear whether such an action would involve a 'case or controversy' sufficient to satisfy the requirement of Article III of the Constitution." *Id.* at 17a.

The court did not find it necessary to resolve those doubts about its statutory and constitutional jurisdiction, for it concluded that this suit was unripe for adjudication, in both the constitutional and the prudential sense. With respect to the Article III component of ripeness, the court held that Article III's requirement of an imminent injury to the party invoking the jurisdiction of the federal courts was not satisfied by appellant's contention that it had an interest in preventing the diminution of the quality of education available to Texas schoolchildren, and in moving promptly and efficiently to safeguard that education. J.S. App. 17a-18a. The court declined to assume that, if the State ever found it necessary to appoint a master or management team, the Attorney General and the courts would not handle preclearance requests expeditiously. Any assumptions to the contrary "are, simply, too speculative to sustain a claim." *Id.* at 18a.

With respect to the prudential aspects of the ripeness doctrine, the court concluded that the issues presented were not ripe for judicial resolution under the two-prong analytical framework set forth in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967). First, the court held, this case does not present a "purely legal question[]" that would be "presumptively suitable for judicial review." J.S. App. 18a. Because the sanctions available to the Commissioner "are broad, discretionary, and will be delegated so as to respond to a host of different precipitating circumstances[,] * * * the actual contours of each appoint-

ment order will be determinative of whether an elected board is displaced or its powers in any way diminished." *Id.* at 19a (internal quotation marks and brackets omitted). "The broad discretion accorded the Commissioner under the statute demonstrates the necessity of examining the full factual context in which she is acting before deciding whether an action can be precleared. Put simply, that discretion makes the statute one that cannot be analyzed uniformly in Section 5 terms." *Ibid.*[4]

The district court held further that withholding judicial decision at this stage would not "cause undue hardship" to appellant. J.S. App. 21a. Whereas appellant alleged that requiring preclearance each time the Commissioner places a management team or master in a school district would prevent it from moving promptly to protect education, the court found that allegation to be "so vague that it really amounts only to a complaint that this issue remains unresolved." *Ibid.* (internal quotation marks omitted). The court was "unwilling to assume that administrative or judicial preclearance will prove so unwieldy as to deny Texas a meaningful opportunity to expeditiously

[4] The court distinguished *Texas* v. *United States*, 866 F. Supp. 20 (D.D.C. 1994), in which a three-judge district court held that legislation abolishing an elected water district and creating a new appointed body in its stead required preclearance, even though the new appointed authority was not yet functional. In that case, the court concluded that any implementation of the statute would affect voting, and therefore the statute required preclearance regardless of the precise details of its implementation. "The statute at issue in this case, by contrast, gives such wide discretion and flexibility to the Commissioner that, absent an actual appointment, there is no way to determine whether an elected school board will be replaced or its powers diminished." J.S. App. 20a.

implement its statutory scheme." *Ibid.* It also observed that, in Section 5, Congress itself had "struck the balance in favor of preclearance to protect voting interest[s] over school district changes to improve the education process." *Ibid.*

SUMMARY OF ARGUMENT

I. The district court lacked statutory subject-matter jurisdiction over this case. The Voting Rights Act of 1965 sets forth specific avenues for a judicial determination whether a change in state law is a change with respect to voting that requires preclearance. This case, however, does not fall within any of the categories of suits that are within the Act's design. In particular, this case is not a judicial preclearance action brought by a covered jurisdiction for a determination that a change does not have a discriminatory purpose or retrogressive effect. Rather, appellant has brought its declaratory judgment action solely for a determination that its proposed, possible changes would not be changes with respect to voting. In effect, appellant has sought a declaratory judgment to the effect that it does not need to seek a declaratory judgment under Section 5 for preclearance of its changes. That kind of suit does not fall within the jurisdiction granted to the United States District Court for the District of Columbia for actions under Section 5. The district court might, in a properly presented action for judicial preclearance of Section 39.131(a)(7) and (8), decide that those provisions are not covered by Section 5, but it would not be required to decide the case on that basis; and because appellant has not brought and could not bring an action for judicial preclearance of a hypothetical future implementation of those provisions, there is no

basis in Section 5 for a judicial determination that such a future implementation would not affect voting.

II. The district court correctly dismissed this case as unripe. The case fails to meet the core Article III requirement of a ripe controversy because appellant has not pointed to any definite plan now or in the immediate future to appoint a master or management team for any particular school district in Texas. Especially because appellant's policy is to use less intrusive sanctions before more intrusive ones (such as the appointment of a master or management team), it remains entirely speculative whether appellant will ever find it necessary to deploy those more intrusive measures. The courts may never be called upon to decide whether the Commissioner of Education's appointment of a master or management team would be a *de facto* replacement of an elected school board requiring preclearance under Section 5.

Prudential considerations also militate against judicial decision of the coverage issue at this time. The powers that may be vested in a master or management team are subject to the Commissioner's broad discretion, and may vary widely from case to case. The answer to the question whether such an appointment would amount to a *de facto* replacement will turn on the precise nature of the powers granted to an appointed official and concomitantly removed from an elected board. Therefore, the question of coverage is not one that the district court can resolve as a pure issue of law, but rather requires a concrete factual context for an informed decision. Nor would appellant suffer undue hardship if judicial resolution of the question of coverage were postponed until such a concrete context arises. Should the Commissioner seek to appoint a master or management team, the

State can request expedited consideration from the Attorney General or from the district court.

Federal education statutes relied on by appellant provide no basis for overturning the district court's ripeness decision. Notwithstanding those statutes, appellant still does not have a present, actual plan to impose sanctions on a local school district, and postponing consideration of the legal issue would not cause it hardship; therefore, it has no ripe claim. Moreover, appellant's contention on the merits that those statutes exempt it from coverage under Section 5 is foreclosed by *Young* v. *Fordice*, 117 S. Ct. 1228 (1997).

III. Should the Court conclude that a justiciable controversy is present in this case, it should remand the case to the district court for further proceedings on the question of coverage under Section 5, rather than address that issue in the first instance. Appellant did not present the question of coverage in its jurisdictional statement, the district court made no findings of fact or conclusions of law on that issue, and discovery may be necessary for a proper presentation of the question to the district court.

ARGUMENT

I. THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA LACKS STATUTORY JURISDICTION OVER A DECLARATORY JUDGMENT ACTION BROUGHT BY A COVERED JURISDICTION SOLELY FOR A DECLARATION THAT A SUBMITTED CHANGE DOES NOT AFFECT VOTING

1. The gravamen of appellant's complaint in its declaratory judgment action is that the potential future appointment of a master or management team by the Texas Commissioner of Education for a local school district would not be a new "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," for which preclearance would be required by Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c. The Act sets forth four mechanisms by which a determination can be made that a particular covered jurisdiction's action is or is not a change with respect to voting.

First, under Section 5, the jurisdiction may submit the proposed change to the Attorney General for preclearance. The Attorney General may conclude that the proposed change does not affect voting, and if the Attorney General makes no objection to the proposed change within 60 days or indicates within that time that no objection will be made, then further litigation on coverage is precluded and the change may be freely implemented. See *Morris* v. *Gressette*, 432 U.S. 491, 502-505 (1977).

Second, if and when a covered jurisdiction intends to implement a change, it may request a declaratory judgment from a three-judge district court in the District of Columbia that "such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. 1973c. In deciding such an action, the district court has authority to decide whether a proposed change affects voting. See *Texas* v. *United States*, 866 F. Supp. 20 (D.D.C. 1994) (three-judge court); see also *City of Lockhart* v. *United States*, 460 U.S. 125, 131-132 (1983) (deciding whether new practice was a change from previous practice and thus covered by Section 5). If the change does not affect voting, then it is not a "practice" or "procedure" that could "deny[] or abridg[e] the right to vote" within the meaning of Section 5.

Third, a covered jurisdiction that believes that a change does not affect voting may simply implement it. If the Attorney General believes that the change does affect voting and should have been precleared under Section 5, the Act expressly provides that she may institute an enforcement action in a local three-judge district court to enjoin its implementation until preclearance is completed. See 42 U.S.C. 1973j(d) and (f).[5] In such an enforcement action, the district court has authority to decide whether or not the implemented change affects voting and therefore requires preclearance (and this Court on appeal has the same authority). See *Georgia* v. *United States*, 411 U.S. 526, 531-535 (1973). If the courts conclude that the

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[5] Section 12(d) of the Act, 42 U.S.C. 1973j(d), provides: "Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by [Section 5] * * * the Attorney General may institute for the United States * * * an action for preventive relief." Section 12(f) provides that the district courts have jurisdiction over such actions. 42 U.S.C. 1973j(f).

change does not affect voting, then preclearance is not required, and the Attorney General's enforcement action should be dismissed.

Private plaintiffs may also pursue a similar, fourth avenue of review that is available under Section 5 by necessary implication. Once a covered jurisdiction implements a proposed change, private plaintiffs may also sue for injunctive relief in a local three-judge district court if they believe that the change required preclearance. See *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 554-557 (1969). In such a private action, the district court (and this Court on direct appeal) may decide whether or not the change affects voting and requires preclearance. See, *e.g.*, *Presley* v. *Etowah County Comm'n*, 502 U.S. 491 (1992); *Perkins* v. *Matthews*, 400 U.S. 379, 387-395 (1971); *Allen*, 393 U.S. at 563-571.

2. The Voting Rights Act therefore provides specific and carefully focused mechanisms for resolution of the question of coverage. But as the court below noted (J.S. App. 16a), this case "does not fit neatly into the statutory framework" of the Act and "does not fall clearly into any of the[] three categories" of lawsuits contemplated by the Act. In particular, appellant's declaratory judgment action is not a preclearance action that falls within the jurisdiction of the district court for the District of Columbia expressly established by Section 5.[6] Nor is there in Section 5 a

[6] It is appropriate to view Section 5's limited grant of authority to the District of Columbia district court to hear preclearance actions as jurisdictional. When this Court upheld the related and similar grant of authority to the District of Columbia district court in Section 4(a) of the Act, 42 U.S.C. 1973b(a), to hear and decide declaratory judgment actions brought by covered jurisdictions to terminate the suspension of voting tests and devices, it stated that "Congress might appropriately limit litigation under this provision to a single court in the District of Columbia, pursuant to its constitutional power under Art. III, § 1, to 'ordain and establish' inferior federal tribunals." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 331 (1966). The exclusive jurisdiction of the District of Columbia district court to hear declaratory judgment actions under both Sections 4 and 5 is based on the same provision in Section 14(b), 42 U.S.C. 1973*l*(b) ("No court other than the District Court for the District of Columbia * * * shall have jurisdiction to issue any declaratory judgment pursuant to [Section 4 or 5]."). The Court has also stated that "only the District Court for the District of Columbia has jurisdiction to consider the issue of whether a proposed change actually discriminates on account of race," in holding that other district courts may not decide substantive issues arising under Section 5, but may decide only whether a change is covered by Section 5 and was precleared. *United States* v. *Board of Supervisors of Warren County*, 429 U.S. 642, 646 (1977) (per curiam).

As we noted above (p. 10, *supra*), the United States did not, in the district court, contest that the court had jurisdiction under Section 5 (although we did argue that the case was not ripe). Nevertheless, because subject-matter jurisdiction may not be conferred on a federal court by consent, and because appellant raised the issue of the district court's statutory jurisdiction as a question presented in its jurisdictional statement (see J.S. i), this Court may at this stage decide whether the district court had statutory subject-matter jurisdiction over this case.

waiver of the United States' sovereign immunity for the kind of action brought by appellant in this case. The central authority of the District of Columbia district court in judicial preclearance actions is to determine whether a proposed change is retrogressive or is motivated by a discriminatory purpose. See *Reno* v. *Bossier Parish School Bd.*, 117 S. Ct. 1491, 1497-1501 (1997); *Beer* v. *United States*, 425 U.S. 130, 140-141 (1976). Appellant, however, has not sought a

determination from the district court that its proposed change is neither retrogressive nor invidiously motivated. Rather, it has sought a "blanket determination that any action pursuant to the Commissioner's new authority under Chapter 39 would not be a change covered by section 5." J.S. App. 16a-17a.

It is true that, when the District of Columbia district court hears a traditional judicial preclearance action in which a ripe controversy is presented, that court may decide the case in favor of the covered jurisdiction if it concludes that preclearance is not required at all because the proposed change does not affect voting. See pp. 16-17, *supra*. To hold otherwise would be to impose a pointless requirement on a covered jurisdiction. Because "changes subject to § 5 pertain only to voting," *Presley*, 502 U.S. at 502, the district court, when hearing a preclearance action, would not be justified in denying relief to the covered jurisdiction from the strictures of Section 5 simply because Section 5 was not applicable *at all*. In that situation, however, the district court has statutory authority under Section 5 to hear and decide the case. The fact that the district court may grant relief on that basis when it does have jurisdiction over a preclearance action does not imply that it also has jurisdiction to decide declaratory judgment actions brought to raise *only* the question of coverage, and when no question of preclearance is presented.

Moreover, although a covered jurisdiction might bring a preclearance action in the District of Columbia district court and request relief on the alternative basis that legislation or its implementation is not covered by Section 5, the district court would not be obligated to rule on that basis; it might rule in favor of the covered jurisdiction on the ground that the

legislation does not have discriminatory purpose and will not have a retrogressive effect. In such a case, the covered jurisdiction would be a prevailing party in the district court and could not appeal to this Court from the declaratory judgment in its favor merely on the ground that it would have preferred that the lower court rule in its favor on another rationale with broader implications for hypothetical future conduct. See *Gunn* v. *University Comm. to End the War in Viet Nam*, 399 U.S. 383, 390 n.5 (1970); *Public Serv. Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204, 206-207 (1939) (per curiam).

Thus, instead of submitting Section 39.131(a)(7) and (8) to the Attorney General for administrative preclearance (or if the Attorney General had denied preclearance), appellant could have brought a judicial preclearance action under Section 5, asking the district court to preclear those provisions and arguing, *inter alia*, that they are not voting changes. The district court, however, might have precleared those provisions on narrower grounds as enabling legislation that does not itself have a prohibited purpose or effect, just as the Attorney General precleared them as enabling legislation (see p. 8, *supra*). Appellant, moreover, could not have asked the district court to preclear any hypothetical actual *implementation* of Section 39.131(a)(7) or (8) under Section 5, because the State does not yet "seek to administer" those provisions (and indeed appellant did not request preclearance of their implementation under Section 5). It follows that, because appellant could not yet obtain substantive judicial preclearance of any actual implementation of a particular sanction under Section 39.131(a)(7) or (8), there is no statutory basis under Section 5 for the District of Columbia district court

to entertain a suit merely to provide appellant with a ruling that such an implementation would not be a voting change covered by Section 5.

Nor can the district court's authority to decide this case be predicated on another express statutory source of federal jurisdiction, such as 28 U.S.C. 1331, the general federal-question statute, or 28 U.S.C 1343(a)(4), providing for jurisdiction to grant equitable relief "under any Act of Congress providing for the protection of civil rights, including the right to vote." To proceed against the United States under either statute, appellant would also have to point to some applicable express waiver of sovereign immunity, such as the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.* This Court has already heid, however, that the Attorney General's preclearance decisions are not subject to judicial review under the APA, *Morris* v. *Gressette*, 432 U.S. at 506, and in any event appellant has never suggested that this case was brought as an APA action.[7]

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[7] Appellant's complaint alleged jurisdiction under Section 1331, but not Section 1343, and did not refer to the APA at all. J.A. 6. In its jurisdictional statement, appellant presented only the question of jurisdiction under Section 5. J.S. i. In its brief on the merits, appellant has not addressed the question of statutory jurisdiction at all.

In addition, Section 1343 limits federal jurisdiction to civil rights actions brought by "any person." It is doubtful that a political entity, such as appellant, is a "person" within the meaning of Section 1343. See *United States* v. *City of Jackson*, 318 F.2d 1, 8 (United States not a "person" under Section 1343), on denial of reh'g, 320 F.2d 870 (5th Cir. 1963); *Buda* v. *Saxbe*, 406 F. Supp. 399, 403 (E.D. Tenn. 1975) (State not a "person" under Section 1343). Section 1343 and its substantive counterpart, 42 U.S.C. 1983, were enacted to allow the enforcement by "private parties" of their civil rights against

Finally, there is nothing in the structure or purpose of the Voting Rights Act to indicate that Congress *implied* authority for the District of Columbia district court to decide actions of this nature against the United States. This Court has found that Congress implied for private plaintiffs an avenue of relief from voting changes that have not been precleared in conformity with Section 5. *Allen*, 393 U.S. at 554-557. That situation, however, did not involve the need for any waiver of sovereign immunity by the United States, since the implied cause of action did not run against the United States. See *id.* at 558-559. A waiver of the federal government's sovereign immunity, by contrast, must be unequivocally expressed in the statutory text, and must extend unambiguously to the specific kind of claim that is pressed against the United States. See *Lane* v. *Peña*, 116 S. Ct. 2092, 2096-2097 (1996). There is no express provision in the Act permitting covered jurisdictions to sue the United States solely for a declaration that a proposed change is not covered by the Act.

Furthermore, the considerations that persuaded the Court in *Allen* to find an implied avenue of relief for private plaintiffs against covered jurisdictions are not applicable here. The Court in *Allen* concluded that Congress would not have wanted private persons to be completely dependent on the Attorney General's limited resources for protection from unprecleared changes, and that "[t]he guarantee of § 5 that no

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governmental actors, see *Moor* v. *County of Alameda*, 411 U.S. 693, 699 (1973), but political entities such as appellant have no such civil rights against the United States. See *South Carolina* v. *Katzenbach*, 383 U.S. at 323-324 ("person[s]" protected by the Due Process Clause of the Fifth Amendment do not include States).

person shall be denied the right to vote for failure to comply with an unapproved new enactment subject to § 5, might well prove an empty promise unless the private citizen were allowed to seek judicial enforcement of the prohibition." 393 U.S. at 557. By contrast, a covered jurisdiction that desires to implement a proposed change has effective remedies; it may submit the change to the Attorney General for review, it may bring a traditional judicial preclearance action, or it may simply implement the change and raise as a defense to any enforcement action the argument that the change is not covered by Section 5. Accordingly, the district court lacked statutory jurisdiction under the Voting Rights Act to decide this case.[8]

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[8] Although the district court lacked jurisdiction over this action, this Court has appellate jurisdiction over the State's appeal from the district court's judgment of dismissal. Section 5 provides that "any appeal" from a decision of a three-judge district court convened to decide a case under Section 5 shall lie to the Supreme Court. 42 U.S.C. 1973c. This Court has held that the words "any appeal" in Section 5 are to be given a broad construction. See *NAACP* v. *New York*, 413 U.S. 345, 353 (1973). Thus, even if the three-judge court was not properly convened in this case (because it lacked subject-matter jurisdiction over appellant's complaint), this Court has statutory authority to hear and decide the State's direct appeal from that court's judgment of dismissal on ripeness grounds. That point contrasts with the Court's much more limited appellate jurisdiction under 28 U.S.C. 1253; under that provision, this Court may hear and decide appeals only from orders of district courts granting or denying an injunction "in any civil action, suit or proceeding *required* by any Act of Congress to be heard and determined by a district court of three judges" (emphasis added). Cf. *Gonzalez* v. *Automatic Employees Credit Union*, 419 U.S. 90, 101 (1974) (concluding that Court lacked jurisdiction to hear direct appeal from three-judge court's order dismissing case for lack of standing, and remanding for entry of fresh order to be appealed to court of appeals).

II. THE DISTRICT COURT CORRECTLY HELD THAT THE QUESTION OF THE APPLICABILITY OF SECTION 5 TO POTENTIAL FUTURE IMPLEMENTATIONS OF SECTION 39.131(a) (7) OR (8) IS NOT RIPE FOR JUDICIAL REVIEW

Even if the district court had statutory subject-matter jurisdiction under Section 5, it nonetheless correctly dismissed this case. In the absence of any definitive plan by state authorities to appoint a master or management team to any particular local school district now or in the future, the district court correctly ruled that the question of the applicability of Section 5 to the State Education Commissioner's potential invocation of such sanctions is not ripe for judicial review.

A. The State's Request For A Declaratory Judgment Does Not Satisfy The Constitutional Requirement Of A Ripe Controversy

1. Chapter 39 of the Texas Education Code empowers the Texas Commissioner of Education to impose a number of sanctions on school districts, in ascending order of severity and intrusiveness. The Commissioner may, for example, issue a public notice of a school district's deficiency, order the preparation of a student achievement plan by a school district, appoint an agency monitor to "participate in" the activities of a school board, appoint (as pertinent here) a master to "oversee" the operations of a district or a management team to "direct" the operations of a district, or

appoint a board of managers to "exercise the powers" of the school board. See Tex. Educ. Code Ann. § 39.131(a) (West 1996). The available powers afford the Commissioner wide discretion in choosing a sanction appropriate to the degree of deficiency in any particular school board, and it is not contested that the Commissioner has authority to use a less intrusive sanction (such as appointing a monitor) before deploying a more drastic one involving the removal of authority from a local school board (such as appointing a master or management team). Indeed, appellant acknowledges (Br. 9) that the policy of the state education agency is to use the less intrusive interventions, such that the more intrusive ones may never become necessary. In the event that a school district's deficiencies justify intervention under Chapter 39, the exercise of less intrusive powers by the Commissioner may resolve the problems. It is therefore not certain that the Commissioner will ever find it necessary to appoint a master or management team under Chapter 39 for any school district, and appellant has not pointed to any specific situation in which even the *potential* application of Section 39.131(a)(7) or (8) is currently foreseen.

Because the State may never find it necessary to appoint a master to oversee the operations of a school board or to appoint a management team to direct those operations, the State's request for a declaratory ruling that such an appointment would not implicate Section 5 is not ripe for review, in the constitutional sense. This case is similar to *Renne* v. *Geary*, 501 U.S. 312 (1991), where the Court ruled that a ripe controversy was not presented by political parties' constitutional challenge to a state statute prohibiting political party endorsements of candidates for nonpar-

tisan offices. As was the case in *Renne*, where the Court "discern[ed] no ripe controversy in the allegations that [the political parties] desire to endorse candidates in future elections" because the parties had not "allege[d] an intention to endorse any particuar candidate," *id.* at 321, here appellant has not alleged any intention to impose the relevant sanctions in any particular case. And as in *Renne*, where the Court stressed its uncertainty about "the nature of the endorsement, how it would be publicized, or the precise language [the State] might delete from the voter pamphlet," *id.* at 322, here it remains entirely uncertain what powers the Commissioner might vest in a master or management team, and concomitantly what powers might be removed from an elected school board.

In effect, appellant has asked for an advisory opinion that, *if* the Commissioner decided at some point to appoint a master or management team, that appointment would not require preclearance under Section 5. Cf. *International Longshoremen's & Warehousemen's Union* v. *Boyd*, 347 U.S. 222, 224 (1954) ("That is not a lawsuit to enforce a right; it is an endeavor to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable."). But appellant has given no indication that the Commissioner intends imminently to appoint a master or management team to any particular school district. There is "no factual record of an actual or imminent application of [state sanctions] sufficient to present the [Section 5] issues in clean-cut and concrete form." *Renne*, 501 U.S. at 321-322 (internal quotation marks omitted); cf. *United Public Workers* v. *Mitchell*, 330 U.S. 75, 90 (1947) (justiciable controversy is pres-

ent only when "definite rights appear upon the one side and definite prejudicial interferences upon the other").

Furthermore, the powers that may be conferred on masters and management teams under Section 39.131(a)(7) and (8) are subject to the Commissioner's broad discretion. Those provisions allow appointment of a master to "oversee" the operations of a school district or a management team to "direct" such operations. While such appointments may result in a change affecting voting if broad powers are conferred by the Commissioner, an appointment may also narrowly circumscribe the powers granted to the appointed officials. Thus, postponing consideration of the Section 5 issue "also has the advantage of permitting the state [authorities] further opportunity to construe" the pertinent provisions of Chapter 39 and giving greater clarity to the federal question of the application of Section 5 that would be presented by appointment of a master or management team. Cf. *Renne*, 501 U.S. at 323.

Appellant suggests (Br. 18-20) that the Article III requirement of ripeness is precisely equivalent to that of standing, and that a justiciable controversy is presented because it has standing under *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555 (1992), and *Northeastern Florida Chapter of Associated General Contractors* v. *City of Jacksonville*, 508 U.S. 656 (1993). Appellant's premise that it currently has Article III standing is dubious, in light of the hypothetical and contingent nature of its present claim. In any event, "[j]usticiability concerns not only the standing of litigants to assert particular claims, but also the appropriate timing of judicial intervention." *Renne*, 501 U.S. at 320. "That a proper party is before the court is no answer to the objection that he is there prematurely." *Communist Party of the United States* v. *Subversive Activities Control Bd.*, 367 U.S. 1, 79 (1961). The justiciability issue in this case is not whether appellant is a proper party to bring a suit under Section 5; Section 5 itself specifically accords a covered jurisdiction standing to seek preclearance as the entity that has enacted (and may seek to administer) a change. It does not follow, however, that a ripe controversy is present before the State seeks to administer a particular change, such as the imposition of sanctions on an elected school board.

Appellant claims to suffer injury ripe for adjudication because, if it wishes to invoke one of the sanctions authorized by Section 39.131(a)(7) or (8) at some point in the future, it might then suffer from "inability to move promptly and efficiently to safeguard the education of its children" and therefore might then suffer an "unwarranted" federal interference into "routine matters" of governance (App. Br. 19, quoting *Presley*, 502 U.S. at 507). But appellant may never actually invoke the powers authorized by Section 39.131(a)(7) and (8); and even if in the future it does invoke those powers and seek to have the specific implementation precleared, there is no basis for presuming that undue delay will occur. And even if there were such a basis, that would not authorize a federal court to render an advisory opinion about an array of hypothetical potential future events. As the district court pointed out, Article III ripeness is not satisfied when a "case involves uncertain or contingent future events that may not occur as anticipated, or indeed may not occur at all." J.S. App. 6a; see *Richardson* v. *City & County of Honolulu*, 124 F.3d 1150, 1160 (9th Cir. 1997) (challenge to constitutionality of Hawaii

condemnation statute unripe as long as many conditions precedent to condemnation may never be fulfilled). "A mere hypothetical threat is not enough" to create a ripe controversy. *United Public Workers* v. *Mitchell*, 330 U.S. at 90.

B. Prudential Considerations Also Counsel Against A Decision At This Time On The Question Of Section 5's Coverage Of Future Implementations Of Section 39.131(a)(7) And (8)

Even apart from the fact that appellant's request for a declaratory judgment fails to meet the core constitutional requirement of ripeness, prudential considerations also strongly militate in favor of postponing decision as to whether particular implementations of Section 39.131(a)(7) and (8) might affect voting, as the district court concluded. The question of "prudential ripeness" is "best seen in a twofold aspect, requiring [a court] to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 149 (1967). As the district court pointed out (J.S. App. 18a), "[b]oth prongs of the [*Abbott Laboratories*] test must be satisfied before a court may hear a case and render a decision on the merits." Both factors point here to the conclusion that the claim raised by appellant, that Section 5 does not cover certain sanctions that could be imposed on local school districts by the Commissioner, is not ripe for judicial resolution at this time.

1. The district court correctly observed (J.S. App. 18a-19a) that the central question that appellant sought to have adjudicated is not appropriate for judicial resolution at this time because it does not turn on a pure question of law. Appellant contends

that implementation of Section 39.131(a)(7) or (8) would not affect voting within the meaning of Section 5. To prevail in advance of any definite plan to invoke the sanctions authorized by those subsections, appellant would have to persuade the courts that in no circumstance could the appointment of a master or management team affect voting. In our view, that absolute rule cannot be sustained in the abstract, as the State would wish it to be, for under Section 5 jurisprudence much depends on the extent and nature of the powers that will actually be conferred on a master or management team.

Section 39.131(e) provides that "[t]he commissioner shall clearly define the powers and duties of a master or management team appointed to oversee the operations of [a school] district." Tex. Educ. Code Ann. § 39.131(e) (West 1996). The Commissioner therefore has broad discretion to decide which powers shall be exercised by the appointed officials, and which shall be withdrawn from the elected boards. Subject only to the exceptions set forth in Section 39.131(e)(3)-(6), "if directed by the commissioner," the master or management team "may direct an action to be taken by * * * the board of trustees of the district" (§ 39.131(e)(1)) and "may approve or disapprove *any action* of * * * the board of trustees of the district" (§ 39.131(e)(2)) (emphasis added). Appointed under these provisions, appointees might be charged with setting curricula, determining disciplinary policy, hiring and firing teachers, and generally exercising the principal functions of elected school boards. By contrast, the limitations set forth in appointed officials' powers in Section 39.131(e) may or may not represent meaningful limitations on the power of the appointed body. For example, it may be that the elected

board did not have, or had already relinquished, the power to determine the manner by which it would be elected. See, *e.g.*, Tex. Educ. Code § 11.058(f) (West 1996) (if board of independent school district opts for numbered posts, no future board may rescind that action). Under such a circumstance, the limitation in Section 39.131(e)(4), preventing masters and management teams from changing the method of election of the board of trustees, would not meaningfully withhold any power from the appointed entity that was previously held by the elected board. And although appellant argues that the powers granted to a master or management team are temporary, the statute does not actually establish any fixed time limit on the exercise of such powers. The appointment is subject to renewal every 90 days, and there is no limit to the number of times the Commissioner may renew the appointment.

The potential question of coverage under Section 5 is, therefore, whether the appointment of a master or a management team might amount to a *de facto* replacement of an elected school board by an appointed official and might, for that reason, require preclearance. In *Bunton* v. *Patterson*, a companion case to *Allen* v. *State Board of Elections*, this Court held that the replacement of an elected official with an appointed one is a change affecting voting, within the coverage of Section 5. 393 U.S. at 569-570. Although this case does not involve the outright abolition of an elected board and its replacement with an appointive body, the Court has carefully reserved the question "whether an otherwise uncovered enactment of a jurisdiction subject to the Voting Rights Act might under some circumstances rise to the level of a *de facto* replacement of an elective office with an appointive one, within the rule of *Bunton* v. *Patterson*." *Presley*, 502 U.S. at 508.

Appellant correctly points out (Br. 29 & n.25) that this Court has not endorsed the United States' proposed criterion for determining when a shift in governmental authority amounts to a *de facto* replacement—*viz.*, when the change divests an elected body of its "reason for being." Neither, however, has the Court rejected that criterion or set forth a definitive alternative rule. The courts have not yet been presented with many examples of changes alleged to be a *de facto* replacement.[9] Nor is a sufficiently concrete example presented in *this* case. Whether or not there is a "*de facto* replacement" of local authority will depend upon the extent of the elected body's authority and the specifics of the commissioner's mandate in each case. Only when these matters are made clear will the issue be suitable for judicial determination. See *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. 158, 163-164 (1967) (case did not present pure issue of law because, to determine whether regulation authorizing inspections was valid, court would have to consider FDA's need for enforcement tools "in the context of a specific application of this regulation"); cf. *Abbott Laboratories*, 387 U.S. at 149 (noting that "all parties agree that the issue tendered is a purely legal one"); *Suitum* v. *Tahoe Regional Planning Agency*, 117 S. Ct. 1659, 1667 (1997) (zoning determination ripe for adjudication where agency has no further discretion to exercise over plaintiff's right to use her land).

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[9] *Texas* v. *United States*, 866 F. Supp. 20 (D.D.C. 1994), was not such a case. See p. 34, n.10, *infra*.

This case is therefore not like the various finality cases relied on by appellant's amici (Br. 9-11), such as *Columbia Broadcasting System* v. *United States*, 316 U.S. 407 (1942), *Frozen Food Express* v. *United States*, 351 U.S. 40 (1956), and *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192 (1956). In those cases, as in *Abbott Laboratories*—which relied on those three cases, see 387 U.S. at 149-151—a federal agency had issued an order or a regulation announcing a definitive legal rule immediately binding on private parties, and not dependent on particular circumstances for its effect. See *id.* at 151. Similarly, in cases arising under the Voting Rights Act where the legal effect of the change at issue has been clear-cut and nondiscretionary, the courts (including this Court) have not postponed decision. In all of those cases, however, the future allocation of authority did not turn on the discretionary authority of an official or body.[10] Here, by contrast, the contours of the

[10] For example, in *Bunton* v. *Patterson*, private plaintiffs sought a declaratory judgment that a change in the Mississippi Code was covered by Section 5 and could not be enforced without preclearance. Eleven counties that had previously had the option of electing or appointing their superintendents of education were required, by the change, to have superintendents appointed by their board of education. This Court held (393 U.S. at 569-570) that the change in question was covered by Section 5 because, after the change, citizens were "prohibited from electing an officer formerly subject to the approval of the voters" (*id.* at 570). In so holding, the Court recognized that *de jure* replacement of an elected body by an appointed one necessarily affects voting, and that the change might in some contexts have the purpose or effect of abridging the right to vote of those who had thereto been disenfranchised on account of race by other, less subtle means. *Bunton* was followed in *Texas* v. *United States*, 866 F. Supp. at 25-26, in which the district court found that a change in law clearly ousted one elected governing body and substituted another, appointed one. See also *Robinson* v. *Alabama State Dep't of Educ.*, 652 F. Supp. 484 (M.D. Ala. 1987) (three-judge court) (transfer of control of public schools from elected county board of education to city board appointed by city council). Those changes were nondiscretionary ones that affected voting. The statutes in question in *Presley*, *supra*, also did not call for the exercise of official discretion in determining what power would be exercised by what official. One of the changes clearly effected only a reallocation, from individual commissioners to the entire commission, of authority over road building and repair, 502 U.S. at 503-506; the other required an immediate delegation of authority over road improvement to an appointed engineer, *id.* at 506-508. Nothing was left open to any official's or body's discretion for the future reallocation of authority.

authority of a master or management team appointed by the Commissioner remain to be defined.

2. The district court also did not err in concluding (J.S. App. 21a) that appellant would not suffer hardship if judicial resolution of the question of the applicability of Section 5 were postponed until the Commissioner might actually seek to use one of the pertinent powers authorized under Chapter 39. If the Commissioner found it necessary to appoint a master or management team for a school district, then, once the Commissioner had clearly defined the powers of that person or body—as required by Section 39.131(e) of the Education Code—the State could present the appointment plan to the Attorney General for preclearance with a request for expedited consideration. The State would also then be able to request a declaratory judgment from the District of Columbia district court in a concrete factual context. There is, as the district court pointed out (J.S. App. 21a), no reason "to assume that administrative or judicial pre-

clearance will prove so unwieldy as to deny [appellant] a meaningful opportunity to expeditiously implement its statutory scheme."

Appellant suggests that it would suffer hardship from postponed resolution of the issue of coverage because it might be prevented from acting promptly in cases of educational emergency. See App. Br. 36-37; see also Amici Br. 13-16. The United States is not unaware of the States' need to be able to act promptly when local school districts are in trouble. Concern for the voting rights of minorities and for accountability in education are not mutually exclusive. When implementation of a statute such as Texas's Chapter 39 is submitted with all the necessary and relevant information, administrative preclearance can be accomplished expeditiously. See, *e.g.*, *Dobbs* v. *Crew*, No. CV-96-3240 (CPS) *et al.*, 1996 WL 497060 (E.D.N.Y. Aug. 23, 1996) (three-judge court). In *Dobbs*, state legislation in 1974 and 1996 had authorized the New York City Schools Chancellor temporarily to suspend local school boards under specified circumstances. Both enactments had been submitted to and precleared by the Attorney General as enabling legislation with the caveat that individual implementations would need to be precleared as well. *Id.* at *3.[11] In June 1996, Chancellor Crew exercised his authority under the amended statute with respect to three Community School Boards and sought expedited preclearance. He received a letter of no objection in approximately 22 days. *Id.* at *3-*4. The

[11] Under New York law, the Chancellor may continue the "suppression" or "suspension" of a local elected community board for up to one year, and may institute a new board at the end of that time. 1996 WL 497060, at *3 n.6.

Section 5 component of a private suit to enjoin those changes was then declared moot. *Id.* at *4. In short, preclearance need not entail undue delay.

Appellant also contends (Br. 39) that postponing a decision on the merits will cause it harm because of the burden on state sovereignty effected by the requirement of preclearance under Section 5. That contention, however, amounts to little more than a disagreement with Section 5 itself. Section 5 does place some restrictions on the ability of covered jurisdictions to reorganize their governmental structures. When the change affects voting, it cannot be implemented until preclearance has been sought and obtained, and that restriction applies to changes in voting for educational authorities no less than to other aspects of state and local governance. But, as the Court made clear long ago, "[a]fter enduring nearly a century of systematic resistance to the Fifteenth Amendment, Congress might well decide to shift the advantage of time and inertia from the perpetrators of the evil [of race discrimination] to its victims." *South Carolina* v. *Katzenbach*, 383 U.S. 301, 328 (1966); see also *City of Rome* v. *United States*, 446 U.S. 156, 172-183 (1980). The process of preclearance required by Congress imposes some burdens on state sovereignty, but the judgment that a short delay in the implementation of state voting changes is necessary to effectuate the guarantees of the Fifteenth Amendment was for Congress to make. And the hardship suggested by the State is really nothing more than the uncertainty of the eventual outcome of the preclearance process. As the district court observed, this allegation of a grievance "is so vague that it 'really amounts only to a complaint that this issue remains unresolved.'" J.S. App. 21a.

Nor is this a case like *Abbott Laboratories*, where the agency issued a regulation that had an immediately binding effect on private parties. Even though the agency was not in a position to enforce the order or regulation immediately, the Court emphasized that the order was "made effective upon publication, and * * * that compliance was expected." *Abbott Laboratories*, 387 U.S. at 151; see *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 891 (1990) (ripe controversy exists when agency issues "a substantive rule which as a practical matter requires the plaintiff to adjust his conduct immediately"). The Assistant Attorney General's December 11, 1995, letter to appellant, taking the position that preclearance is required for individual implementations of sanctions under Section 39.131(a)(7) and (8), did not require appellant to adjust its primary conduct. No "advance action" was required of appellant, and the impact of the letter (which merely restates the preexisting statutory requirement of preclearance) cannot be said to be felt immediately in appellant's "day-to-day affairs." See *Toilet Goods Ass'n* v. *Gardner*, 387 U.S. at 164; cf. *Gardner* v. *Toilet Goods Ass'n*, 387 U.S. 167, 171 (1967) (finding case ripe because challenged regulations "are self-executing, and have an immediate and substantial impact upon the respondents").

Indeed, a concern for ripeness is reflected in the very structure of Section 5 and in the Attorney General's regulations. Section 5 applies when a jurisdiction either "enacts" or "seeks to administer" a voting change. When an authorizing statute vests discretion in a state official, the Attorney General may be able to preclear the "enactment," but she cannot predict how the official having discretion will ultimately "seek to administer" that enactment. The Attorney General

cannot, and the district court should not, give a covered jurisdiction *carte blanche* by assuming that specific actions pursuant to the authorizing statute, not yet identified or described, will not affect voting, or will not have either a discriminatory purpose or retrogressive effect. See, *e.g.*, *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 178 (1985) (separate preclearance required for change in qualifying period for an election even though general underlying statute had already been precleared); compare *Clark* v. *Roemer*, 500 U.S. 646, 658 (1991) (changes to be precleared must be identified with specificity). The Attorney General's procedures requiring the preclearance of specific implementations of a general authorizing statute, 28 C.F.R. 51.15, also reflects a ripeness concern that changes should be submitted for preclearance in a concrete context.[12] The Attorney General correctly relied upon that provision, and the district court correctly invoked the same principle in its constitutional and prudential manifestations when it decided to stay its hand until it was presented with a ripe case or controversy.

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[12] Section 51.15(a) provides:

> With respect to legislation (1) that enables or permits the State * * * to institute a voting change or (2) that requires or enables the State * * * to institute a voting change upon some future event or if they satisfy certain criteria, the failure of the Attorney General to interpose an objection does not exempt from the preclearance requirement the implementation of the particular voting change that is enabled, permitted, or required, unless that implementation is explicitly included and described in the submission of such parent legislation.

C. The State Sanctions' Alleged Conformity With Federal Education Statutes Does Not Create A Ripe Controversy

Finally, appellant contends (Br. 32-37) that the sanctions in question need not be precleared because they are consistent with federal statutes requiring recipients of federal financial assistance to have in place methods to impose sanctions on school districts that fail to show improved performance, and providing those recipients with flexibility in choosing their sanctions. That contention provides no basis for overturning the district court's ripeness ruling.

Whether state sanctions are consistent with the provisions of federal law on which appellant relies is, arguably, a purely legal question, and therefore there may be fewer prudential concerns militating against a decision whether those provisions of federal law pretermit the requirement of preclearance imposed by Section 5. Nonetheless, the irreducible Article III requirement of a live controversy is still absent, for the reasons we have explained (pp. 25-30, *supra*); in particular, appellant has demonstrated no concrete plan to impose the relevant sanctions on any school district. That part of appellant's case presents a purely legal question in the abstract does nothing to provide concreteness to the controversy. And, as we have explained (pp. 35-39, *supra*), appellant would suffer no hardship from a postponement of the controversy until it actually seeks to implement sanctions on a local school district.

Furthermore, appellant's reliance on the federal education statutes is unavailing anyway. In *Young* v. *Fordice*, 117 S. Ct. 1228, 1235-1236 (1997), this Court reaffirmed that even changes in state law relating to voting that are enacted to conform to federal statutory requirements require preclearance under Section 5. When the federal law leaves matters of implementation to the State's discretion, "[i]t is the discretionary elements of the new federal system that the State must preclear." *Id.* at 1239. Appellant does not suggest that the precise details of any appointment of a master or management team under Section 39.131(a) (7) and (8) are prescribed by federal law; rather they are, plainly, left to the State's discretion. Thus, *Young* v. *Fordice* makes clear that the federal education statutes relied on by appellant are irrelevant to this case. As to the central issue in the case—whether the appointment of and conferral of authority on a master or management team requires preclearance—there remains no live controversy.[13]

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[13] There are at least two further difficulties with appellant's reliance on federal education statutes, especially the statute authorizing the so-called "Ed-Flex" program permitting the Secretary of Education to waive certain requirements arising under federal statutes providing financial assistance to local education programs, 20 U.S.C. 5891. First, the Secretary of Education has concluded that Ed-Flex "does not, in any way, modify the State's obligations with respect to civil rights." J.S. App. 40a. Second, on July 25, 1997, the Department of Education advised the Texas Commissioner of Education that Ed-Flex does not authorize waivers of requirements that are applicable to *state* education agencies, but rather applies "only to waivers of requirements applicable to [local education agencies] or schools." App., *infra*, 2a. Accordingly, the Ed-Flex statute provides no basis for a conclusion that the imposition of sanctions on local school districts is exempt from Section 5.

III. SHOULD THE COURT CONCLUDE THAT SUBJECT-MATTER JURISDICTION AND A RIPE CONTROVERSY ARE PRESENT, IT SHOULD REMAND FOR FURTHER PROCEEDINGS ON THE MERITS

Should the Court conclude, contrary to our submissions, that the district court had subject-matter jurisdiction over this case and that a ripe controversy is present, it should remand the matter for further proceedings in the district court, rather than decide in the first instance the questions of coverage under Section 5 raised by appellant's brief. As we have explained, whether applications of the sanctions under Chapter 39 are covered by Section 5 may turn on the specific powers granted by the Commissioner of Education to a master or management team and the specific powers withdrawn from a local school board. Only when the extent of the intervention by the Commissioner is made clear will the courts be able to make a fully informed decision as to whether there would be a "*de facto* replacement of an elective office with an appointive one," *Presley*, 502 U.S. at 508, such that preclearance under Section 5 would be required. There has been no development of the record on that question, and discovery may be necessary for a proper presentation of the matter to the district court.[14]

The district court also made no findings of fact or conclusions of law on the question of coverage. This Court ordinarily does not decide in the first instance

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[14] Thus, contrary to appellant's suggestion that this Court decide the merits of the coverage question in the first instance, this is not a case in which "[t]he record is adequate to enable [the Court] to decide whether the challenged changes should have been submitted for approval" (App. Br. 18 n.22).

matters that have not been addressed at all in the lower courts. See *Clark*, 500 U.S. at 659-660; *Keller* v. *State Bar*, 496 U.S. 1, 17 (1990); *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 812-813 (1985). Moreover, the State did not raise the issue of coverage of Section 5 as a question presented in its jurisdictional statement. See J.S. i. Nor is the question of coverage "fairly included" within the questions that were presented by the jurisdictional statement, *viz.*, the district court's statutory jurisdiction and the ripeness of the controversy. This Court therefore should not reach the substantive issue of coverage. See *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992); Sup. Ct. R. 18.3 (incorporating, for jurisdictional statements, requirements for certiorari petitions). Should this Court reverse the district court's ripeness ruling, it should remand the case to the district court to address the question of coverage in the first instance. Cf. *Abbott Laboratories*, 387 U.S. at 156 (after finding that review was not precluded and that case was ripe, remanding for proceedings on the merits).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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DECEMBER 1997

APPENDIX

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

THE ASSISTANT SECRETARY

Jul. 25, 1997

Honorable Michael A. Moses
Commissioner of Education
Texas Education Agency
William B. Travis Building
1701 North Congress Avenue
Austin, TX 78701-1494

Dear Commissioner Mike Moses:

This is in response to your May 19, 1997 letter to Tom Fagan, Director of Goals 2000, concerning two proposed modifications in the way the Texas Education Agency (TEA) exercises its Ed-Flex authority. As Chairperson of the Department's Waiver Action Board, I have been asked to respond to your proposals.

The state proposes to require evaluation reports only from districts that do not meet performance objectives established by the Commissioner of Education in granting waivers. In light of the sound state accountability system and the required campus and district improvement plans tied to measurable performance objectives, we have no objection to this proposed modification. I understand that data already available at the TEA will be used to monitor the progress of all waiver recipients in meeting their

performance objectives, and that it may be duplicative to require districts that are meeting or exceeding their objectives to resubmit this data as part of a separate Ed-Flex evaluation report.

Texas has also requested the authority to approve waivers of provisions applicable to the state educational agency (SEA), in addition to approving waivers on a statewide basis of provisions applicable to eligible districts and campuses. We are unable to grant this request for several reasons. First, it is unclear whether Congress intended that the Ed-Flex authority be extended to include waivers of requirements applicable to an SEA. Although the general provision authorizing Ed-Flex (Section 311(e)(2)(A) of the Goals 2000: Educate America Act) does reference requirements applicable to SEAs, the specific statutory provisions governing the submission of Ed-Flex plans to the Department and the actual implementation of Ed-Flex authority by states refer only to waivers of requirements applicable to LEAs or schools.

Furthermore, it does not seem appropriate for the Secretary to delegate to states the authority to grant waivers of requirements applicable to SEAs. In every other instance where waivers are granted, a separate entity determines the appropriateness of the waiver. If an SEA were permitted to grant a waiver to itself, there may not be adequate independent safeguards for evaluating the permissibility of reasonableness of a waiver.

This decision concerning the scope of Ed-Flex authority should in no way impede a state's education reform initiatives. An Ed-Flex state, like any other

state, may request that the Department waive particular SEA-level requirements that are barriers to the implementation of state or local reform plans. We will act on these waiver requests as expeditiously as possible.

I appreciate the opportunity to respond to proposals and applaud your efforts in improving education for all students in Texas.

Should you have any question concerning these matters, do not hesitate to contact me at (202) 401-0113.

Sincerely,

/s/ GERALD N. TIROZZI
GERALD N. TIROZZI

No. 97-29

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

STATE OF TEXAS, *Appellant,*

vs.

UNITED STATES OF AMERICA, *Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF STATE APPELLANT

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January 1998

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TABLE OF AUTHORITIES

I.
THIS ACTION IS RIPE FOR JUDICIAL REVIEW

A.

Appellee contends that, since Texas has no current plan to appoint a master or a management team to a specific school district, the issue of whether this is a change affecting voting is not ripe for judicial review. Yet these concerns did not prevent the Assistant Attorney General for the Civil Rights Division[1] from reviewing the statutory provisions, making the legal conclusion that these provisions were changes affecting voting,[2] and preclearing them[3] as "enabling in nature."[4] Since

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[1] 28 C.F.R. § 51.3 delegates the responsibility and authority for determinations under § 5 to the Assistant Attorney General, Civil Rights Division. In some circumstances, the Chief of the Voting Section can act on behalf of the Assistant Attorney General. The preclearance letter that Texas received was signed by the Acting Chief of the Voting Section. J.S. App. at 35a-38a.

[2] 28 C.F.R. § 51.35 provides that the Attorney General will notify a submitting party that their submission was inappropriate because the changes did not affect voting. Here, the Attorney General did not so notify Texas. To the contrary, it was the Attorney General that identified these provisions as changes affecting voting; Texas had not originally identified them as such because the State did not believe them to be changes affecting voting. Brief of State Appellant at 11-13; Brief for the United States at 7-9.

[3] Brief for the United States at 8-9; J.S. App. at 35a-38a.

[4] 28 C.F.R. § 51.15(a) states:

> With respect to legislation (1) that enables or permits the State or its political subunits to institute a *voting change* or (2) that requires or enables the State or its political sub-units to institute a *voting change* upon some future event or if they satisfy certain criteria, the failure of the

the Assistant Attorney General must abide by the decisions of this Court and other federal courts in making her legal determinations under § 5,[5] there is no reason why the issue is ripe enough to allow the Assistant Attorney General to make this legal judgment, but not ripe enough for a judicial tribunal to do so.

Because the Attorney General has already decided that the appointment provisions are changes affecting voting, the Appellee's ripeness argument applies to the issue of whether a specific appointment has a discriminatory purpose or effect, not to the predicate question of whether the provisions are changes affecting voting. In short, Appellee's argument simply begs the question: It assumes that the provisions allowing for the temporary appointment of a master or management team are changes affecting voting.

B.

Likewise, Texas' claim that §§ 39.131(a)(7) and (8) are authorized under the Educational Flexibility Partnership Act ("Ed-Flex") and, for this reason, are not changes affecting voting, is ripe. This issue requires the interpretation of federal statutory law, independent of any specific placement of a master or management team.

> Attorney General to interpose an objection does not exempt from the preclearance requirement the implementation of the particular *voting change* that is enabled, permitted, or required, unless that implementation is explicitly included and described in the submission of such parent legislation.

(Emphasis added).

[5] 28 C.F.R. § 51.56.

Appellee's reliance on *Young v. Fordice*, 117 S.Ct. 1228 (1997) is misplaced. *Young* involved implementation of the National Voter Registration Act, which specifically required states to implement changes in voting procedures. Unlike the statute in *Young*, §§ 39.131(a)(7) and (8) of the Texas Education Code are *not* changes relating to voting. Sections 39.131(a)(7) and (8), like the counterpart provisions in 20 U.S.C. § 6317(d)(6)(B), relate to *education*. The Commissioner of Education must have the authority to appoint temporarily a master or a management team to assist deficient school districts for the good of the school children in those districts.

Moreover, Appellee argues that Ed-Flex does not authorize waivers of requirements that are applicable to state educational agencies. *See* Brief for United States at 41 n.13.[6] This argument, if true, is unavailing because even if Texas were not authorized to waive the federal requirements, 20 U.S.C. § 6317 would then apply and it requires the State to take certain corrective action during the fourth year of the deficiency, which includes the appointment of a "receiver or trustee to administer the affairs [of a school district]..." 20 U.S.C. § 6317(d)(6)(B)(i)(IV); J.S. App. at 84a-85a (emphasis added).

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[6] Appellee's contention is based on a July 25, 1997 letter from the Department of Education to the Texas Commissioner of Education, App. to Brief for United States, at 1a-3a, that is not part of the record. The July 25, 1997 letter responds to a May 19, 1997 letter from the Texas Commissioner of Education, in which he seeks clarification on whether the Texas Education Agency could grant itself waivers of *administrative* requirements of the Ed-Flex program. Moreover, the Ed-Flex statute specifically permits a state educational agency to waive the requirements of federal law. 20 U.S.C. § 5891(e)(2)(A); J.S. App. 56a-57a. The Secretary's interpretation of a federal statute cannot be substituted for the clear language of the statute.

II.
JURISDICTION WAS PROPER IN THE DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Jurisdiction was and is proper in the District Court for the District of Columbia pursuant to 42 U.S.C. § 1973c, which provides that a covered jurisdiction "may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such a qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color..." Appellee concedes that the District Court for the District of Columbia does have jurisdiction over coverage issues when such a claim is part of a preclearance action.[7] Appellee now argues,[8] however, that this provision does not confer jurisdiction on the District Court for the District of Columbia for the coverage issue brought by Texas.

Declaratory judgment actions under § 5 involve two issues: (1) whether the statutory provision is a change affecting voting, and (2) if it is a change affecting voting, whether such a change has a discriminatory purpose and effect. *Presley v. Etowah*

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[7] Brief for the United States at 20 ("To hold otherwise would be to impose a pointless requirement on a covered jurisdiction.").

[8] Although jurisdiction can be raised at any time during litigation, the Appellee chose not to do so. Rather, Appellee admitted jurisdiction in its Answer, *see* Answer, para. 2, informed the District Court for the District of Columbia that it "did not oppose the plaintiff's motion that a three-judge court be empaneled to hear and decide this action," United States' Response to Order to Show Cause at 14, and failed to mention any concern about jurisdiction in its Motion to Affirm, which it filed with this Court.

County Commission, 502 U.S. 491, 500-06 (1992).[9] The predicate question is not an issue in the vast majority of cases. However, the right to have the District Court for the District of Columbia decide whether the Attorney General is correct in her legal determination that an enactment is a change affecting voting in cases in which she has precleared the enactment is no less important than the right the State has to obtain preclearance from that court in cases in which the Attorney General objects to preclearing a change affecting voting. *See Reno v. Bossier Parish School Board*, 117 S.Ct. 1491, 1504 (1997) (Thomas, J., concurring).

Further, in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), this Court recognized that the importance of federalism requires a three-judge panel to determine whether a state statute is covered under § 5 of the Voting Rights Act:

> We conclude that in light of the extraordinary nature of the [Voting Rights] Act in general, and the unique approval requirements of § 5, Congress intended that disputes involving the coverage of § 5 be determined by a district court of three judges.

Allen, 393 U.S. at 563.

As in *Allen*, the issue here is whether a state enactment is subject to § 5. There is no reason 42 U.S.C. § 1973c should be interpreted to allow both a private litigant and the Attorney General to obtain judicial review of the legal question of whether a state enactment is a change affecting voting, but to deny a state an opportunity to obtain that same judicial review.

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[9] Appellee agrees with this analysis. United States' Response to Order to Show Cause at 5 ("Section 5 coverage determinations involve two basic components: first, does the practice or procedure at issue affect voting; and second, is there the potential for discrimination? (citation omitted)").

The reasoning in *Allen* supports Texas' right to such judicial review. *Allen*, 393 U.S. at 562 ("The clash between federal and state power and the potential disruption to state government are apparent. *There is no less a clash and potential for dispute when the disagreement concerns whether a state enactment is subject to § 5.")* (emphasis added). Here, the suit brought by Texas involves the precise federal-state confrontation addressed in *Allen*.

Texas believes that the Attorney General's error of law has resulted in an unconstitutional application of § 5 of the Voting Rights Act. In such an instance, Texas has a right to have the District Court for the District of Columbia review the Attorney General's legal determination that the appointment of a master or management team is a change affecting voting. If Texas were to be barred from obtaining judicial review of its legal "disagreement concern[ing] whether a state enactment is subject to § 5," *Allen, supra,* at 562, then the unconstitutional application of § 5 could never be corrected. In short, the Department of Justice would be unfettered to arrogate for itself more authority than Congress ever intended it to have to interfere with the routine, non-election related matters of state government.[10] *Presley v. Etowah County Commission*, 502 U.S. 491, 506 (1992) ("The all but limitless minor changes in the allocation of power among officials and the constant adjustments required for the efficient governance of every covered State illustrate the necessity for us to formulate workable rules to confine the coverage of § 5 to its legitimate

[10] To those that suggest that Texas' declaratory judgment action in these circumstances, if allowed, would open the floodgates to litigation, the answer is two-fold: first, such actions are limited only to circumstances such as this where the Attorney General has wrongly determined that a state enactment is a change affecting voting and, preclears the enactment as enabling legislation, thereby requiring the state to submit each application of the enactment for preclearance; and, second, remedying a constitutional wrong must not take a backseat to mere prudential concerns.

sphere: voting.") Thus, the District Court for the District of Columbia has jurisdiction over the action filed by Texas.

III.
THE ISSUE WHETHER §§ 39.131(A)(7) AND (8) ARE CHANGES AFFECTING VOTING WITHIN THE SCOPE OF § 5 IS "FAIRLY INCLUDED" IN THE RIPENESS ISSUE AND PROPERLY BEFORE THE COURT

Finally, in the event this Court concludes both that the district court has subject-matter jurisdiction and that the case is ripe, Appellee urges this Court to remand the case to the district court. Remand is appropriate, Appellee argues, because factual development is needed to determine whether placement of a master or management team would result in a *de facto* replacement of an elective office with an appointive one. Brief for United States at 42-43.

Certainly, at the very least, the State is entitled to a remand. But a remand here is not necessary because no factual development is needed to determine, as a matter of law, that the temporary placement of a master or management team, with powers expressly limited by § 39.131(e), is not a change affecting voting, and is, therefore, not covered by § 5 of the Voting Rights Act.

Moreover, the issue of whether the temporary placement of a master or management team falls within the scope of § 5 is "fairly included" within the ripeness question presented in Texas' Jurisdictional Statement, SUP. CT. R. 14.1(a), and in Brief of State Appellant. SUP. CT. R. 24.1(a).[11] In determining

[11] This Court routinely considers issues which are essential to analysis of the issue presented as "subsidiary issues 'fairly comprised' by the question." *Procunier v. Navarette*, 434 U.S. 555, 559 n.6 (1978). *See also United States v. Mendenhall*, 446 U.S. 544, 551 n.5 (1980).

whether this case is ripe for adjudication, this Court must consider the same factors it would consider in determining whether §§ 39.131(a)(7) and (8) relate to voting.

Nor would consideration of the question surprise or prejudice Appellee. To the contrary - Appellee is well aware of Texas' position and Texas' arguments. Texas raised the coverage issue in the district court below, *see* Texas' Motion for Summary Judgment, and Appellee responded to it. *See* United States' Opposition to Texas' Motion for Summary Judgment. Texas discussed the coverage issue again in detail in its Jurisdictional Statement, J.S. at 2-5, 6-7, 10, 13-20, and in the Brief of State Appellant. Brief of State Appellant at 2-11, 13, 15-18, 20-41. Moreover, the record is adequate to determine whether §§ 39.131(a)(7) and (8) relate to voting.

CONCLUSION

Texas asks this Court to reverse the judgment of the court below and to render a decision on the merits: one that declares that TEX. EDUC. CODE §§ 39.131(a)(7) and (8), as limited by § 39.131(e), are not changes affecting voting, and do not have to be submitted for preclearance under § 5 of the Voting Rights Act.

Respectfully submitted,

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January 1998

(6)

No. 97-29

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

STATE OF TEXAS, APPELLANT,

v.

UNITED STATES OF AMERICA.

On Appeal From the
United States District Court for the
District of Columbia

BRIEF OF AMICI CURIAE WASHINGTON LEGAL FOUNDATION AND THE HONORABLE ROBERT E. TALTON, MARY DENNY, BOB HUNTER, KENT GRUSENDORF AND EUGENE J. SEAMAN IN SUPPORT OF APPELLANT

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30 pp

QUESTIONS PRESENTED

Does a three-judge panel of a district court have jurisdiction over a State's claim, under 42 U.S.C. § 1973c, that an amendment to a state statute is not a change covered by § 5 of the Voting Rights Act, and need not be precleared?

Is a State's claim that an amendment to a statute is not subject to the preclearance requirements of § 5 of the Voting Rights Act ripe, when the United States Attorney General has precleared the statute as "enabling" legislation, but the State has not taken action under the "enabling" legislation?

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INTEREST OF THE *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters nationwide.[1] WLF seeks to promote the rights of states to

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[1] Pursuant to Supreme Court Rule 37.6, WLF hereby states that no counsel for a party in this case authored this brief in whole or in part, and that no person or entity, other than *amici* and their counsel, contributed monetarily to the preparation and submission (continued...)

ensure quality education for school children, and to retain the states' traditional authority to govern in matters of education free from excessive federal interference. WLF has devoted substantial resources to protecting the rights of states to challenge excessive federal intervention into matters in which the states retain a paramount interest, by publishing monographs and similar educational materials on these subjects, and by filing *amicus curiae* briefs in appropriate cases. See, e.g., *Lewis v. Casey*, ___ U.S. ___, 116 S.Ct. 47 (1996) (filing *amicus* brief on behalf of Arizona Constitutional Defense Council concerning state's obligation to provide law libraries for prisoners); *ACORN v. Miller*, ___ F.3d ___, 1997 FED App. 0323P, No. 96-1229 (6th Cir. Nov. 3, 1997) (supporting Michigan's opposition to federal "motor voter" law); Stephen F. Smith, *States Defend Constitutional Rights Against EPA* (WLF LEGAL BACKGROUNDER, Feb. 17, 1995); Michael Scott Feeley and Lino J. Lauro, *Commerce Clause Cases Could Limit Federal Environmental Regulatory Power* (WLF LEGAL OPINION LETTER, Jan. 20, 1995); Maureen E. Mahoney and Michael J. Guzman, *With Motor-Voter Bill, Congress May Have Invited a Constitutional Challenge* (WLF LEGAL OPINION LETTER, Mar. 11, 1994). WLF thus brings a broader perspective to the issues in this case than that presented by the parties in this action.

Amici Robert E. Talton, Mary Denny, Bob Hunter, Kent Grusendorf, and Eugene J. Seaman serve as duly-elected members of the House of Representatives for the State of Texas. As such, they have a direct interest in

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[1](...continued)
of this brief.

ensuring that statutes enacted by the Texas Legislature are implemented without excessive interference from the federal government, and in promoting accountability within the Texas educational system.

WLF is filing this brief with the consent of both parties. WLF has lodged consent letters with the Clerk of the Court.

STATEMENT OF THE CASE

This case arises from a declaratory judgment action brought by the Appellant, the State of Texas ("Texas") in federal district court in the District of Columbia. Texas's complaint alleges that the Texas legislature has enacted amendments to its education laws in order to ensure quality education for the children of Texas. The Texas Education Code, as amended, contains an assessment and accountability system which holds school districts accountable for student performance, compliance with state laws, and effective governance procedures. *See generally* TEX. EDUC. CODE §§ 39.131(a),(e). Of particular importance to this appeal, the statute at issue authorizes the Texas Commissioner of Education to appoint a master or management team, on a temporary basis, in order to bring a local school district into compliance with state educational standards. TEX. EDUC. CODE §§ 39.131(a)(7),(8). The statute specifically describes and circumscribes the powers of the master or management team. TEX. EDUC. CODE § 39.131(e). The statute thus authorizes limited and temporary oversight of elected school district trustees in managing a district's compliance with state standards and federal law.

On June 12, 1995, Texas submitted portions of the legislation containing these amendments to the United States Department of Justice ("DoJ") for administrative preclearance under Section 5 of the Voting Rights Act, although Texas took the position that the sanctions provisions did not constitute election-related changes.[2] DoJ agreed that various sanctions provided under §§ 39.131(a)(1)-(6) were not voting changes subject to preclearance, but maintained that the sanctions provided under §§ 39.131(a)(7)-(10) were changes affecting voting and therefore precleared them only as enabling legislation. DoJ stated that Texas would have to obtain preclearance in each instance in which it placed a master or management team to oversee the operations of a school district under §§ 39.131(a)(7) and (8). Pet. App. at 37a-38a.

On June 7, 1996, Texas filed a declaratory judgment action seeking a ruling that the temporary placement of a master or management team under §§ 39.131(a)(7) and (8) are not changes affecting voting, and that it may use its statutory powers to impose these sanctions without first obtaining preclearance under the Voting Rights Act. In the alternative, Texas sought a declaratory judgment that Section 5 of the Voting Rights Act did not apply to actions taken pursuant to the Improving America's Schools Act, 20 U.S.C. §§ 6301, *et seq.*, as modified under the waiver authority of the Education Flexibility Partnership Demonstration Act, 20 U.S.C. § 5891(e) ("Ed-Flex").

The lower court accepted jurisdiction on July 15, 1996, and appointed a three-judge panel. Before the lower court,

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[2] Texas is a jurisdiction subject to § 5 of the Voting Rights Act. *See* 42 U.S.C. § 1973(b)(b); 28 C.F.R. § 51 app. (1995).

DoJ took the position that the sanctions authorized by §§ 39.131(a)(7) and (8) may well require preclearance, but that Texas's claims were not ripe for review because Texas had not yet appointed a master or management team and its use of the appointment power could only be analyzed on a case-specific basis. The lower court agreed, and dismissed Texas's complaint. Pet. App. at 2a. The lower court reasoned that Texas's claim failed both the constitutional and prudential aspects of the ripeness doctrine, and that Texas's claims of hardship from lack of judicial review were "vague". Pet. App. at 5a-9a. Texas appealed to this Court, and this Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

This case presents an important issue concerning the ability of a state to ensure comparable quality education for all of its school children by reforming its education laws without excessive interference from the federal government. Although this Court and the Congress have consistently recognized the paramount state interest in providing education services,[3] the Appellee United States of America ("United States") in this case takes the position that the federal Voting Rights Act, together with constitutional and prudential concerns of ripeness, require the State of Texas

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[3] *See, e.g.*, 20 U.S.C. § 5899(a)(3) ("in our Federal system the responsibility for education is reserved respectively to the states and the local school systems and other instrumentalities of the states"); and § 5899(b) ("Congress agrees and reaffirms that the responsibility for control of education is reserved to the States and local school systems and other instrumentalities of the States . . . ."); *United States v. Lopez*, ___ U.S. ___, 115 S.Ct. 1624, 1633-34 (1995) (Commerce Clause does not authorize federal government to regulate each and every aspect of local schools).

to seek preclearance any time it takes certain actions under its recently enacted education statute.

Neither the federal Voting Rights Act nor the principle of ripeness dictates the result reached by the lower court and advocated by the United States. Under this Court's seminal decision in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), the ripeness of a case for judicial determination is analyzed under a two-part test. First, the Court considers the "fitness of the issue for judicial determination." Second, the Court considers the "hardship to the parties of withholding court consideration." *Id.* at 149.

Both prongs of the *Abbott Laboratories* test are met by Texas's declaratory judgment action. Texas has asked the lower court to rule on a question of law concerning a matter of statutory interpretation, *viz.*, whether it is required by the Voting Rights Act to seek preclearance for the appointment of a master or management team. The hardship to the State of Texas of denying review would be profound; indeed, Texas's education reforms, which are designed to provide a prompt, temporary response to failures in local school districts, would be eviscerated if Texas were required to mire itself in bureaucratic red tape or time-consuming litigation any time it desired to exercise its authority.

Texas is also correct in its contention that the implementation of its education reforms are not subject to preclearance under the Voting Rights Act. This further demonstrates that the issue Texas presented to the lower court was purely legal and should have been addressed. Section 5 of the Voting Rights Act applies only to changes in voting. As this Court found in *Presley v. Etowah County Commission*, 502 U.S. 491 (1992), the Voting Rights Act

does not apply to changes in the administration of state or local governments which may incidentally effect the powers and functions of an elected office.

Texas also argued below that the education reforms at issue were specifically authorized by federal statutes, and thus, for Voting Rights Act purposes, any actions taken pursuant to the statutes were not actions of a state or local government or subdivision. Therefore, Texas argued alternatively that the reforms were not subject to preclearance under the Voting Rights Act on this basis. Again, framed in this manner, Texas's claim clearly presented a pure legal issue of statutory interpretation which could have and should have been resolved by the lower court. The lower court did not need any further factual development or case-specific application in order to evaluate this claim.

ARGUMENT

The issue before the Court is whether a state which has enacted important reforms to ensure quality education for its school children may implement those reforms without excessive interference from the federal government. Traditional principles of federalism and state autonomy in the provision of education services mandate that Texas be permitted to obtain a judicial determination that its reforms do not require preclearance under the Voting Rights Act. Neither the Voting Rights Act nor ripeness concerns dictate a different result.

I. TEXAS'S CLAIMS ARE RIPE FOR JUDICIAL DETERMINATION

The lower court erred in holding that Texas's declaratory judgment action was not ripe for judicial review. Both parties agree that this Court's decision in *Abbott Laboratories v. Gardner*, 387 U.S. 136, 149 (1967), states the governing law. In *Abbott Laboratories*, this Court held that ripeness is governed by a two-part test; first, the Court must consider the "fitness of the issue for judicial decision", and, second, the Court must consider the "hardship to the parties of withholding court consideration." *Id.* at 149.

The Court explained that "the basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Id.* at 148. Because this case presents legal issues concerning the application of the Voting Rights Act to Texas's educational reforms, and because principles of federalism mandate that Texas control its educational system without excessive federal interference, both prongs of *Abbott* are met by Texas's lawsuit.

A. The Issues Presented by Texas's Declaratory Judgment Action are Fit for Judicial Decision

Texas has asked the lower court to resolve a present case or controversy between itself and the United States. Texas's declaratory judgment action asks the lower court to decide a pure question of statutory interpretation. This case

therefore falls squarely within this Court's decision in *Abbott Laboratories*, in which the Court held that the question whether the Food and Drug Commissioner had correctly interpreted a statute was fit for judicial determination because "the issue tendered is purely a legal one." *Id.* at 149.

This Court in *Abbott* required that the issue to be resolved be "sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Id.* at 152. Like the issue presented in that case, DoJ's decision that Texas's placement of a master or management team must be precleared puts Texas in the dilemma of either complying with the preclearance requirement, and thereby subjecting activities within a traditional sphere of state autonomy to federal supervision, or risking extensive litigation which would defeat the State's ability to govern and ensure quality education.

Notably, the Court in *Abbott Laboratories* cited with approval several prior decisions which confirm that the lower court should have resolved this controversy. In *Columbia Broadcasting System v. United States*, 316 U.S. 407 (1942), this Court held reviewable a Federal Communications Commission regulation which set forth proscribed contractual arrangements between chain broadcasters and local stations. Although the FCC had not in fact denied or revoked any licenses, and the FCC regulation could only have been characterized as "a statement . . . of its intentions", *Abbott Laboratories*, 387 U.S. at 150, the Court held that the regulations were subject to challenge. *Columbia Broadcasting System*, 316 U.S. at 418-19.

The Court also approved of two additional decisions which had taken a similarly "flexible" view of finality. In *Frozen Food Express v. United States*, 351 U.S. 40 (1956), the Court held reviewable an Interstate Commerce Commission order listing exempt commodities, but which had not included the petitioner's commodities. Although the order had no authority except to serve notice of how the Commission interpreted the Act and would have effect only if and when an action was brought against a particular carrier, the Court held the order subject to review. *Id.* at 45. Also, in *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 198 (1956), the Court held reviewable an FCC regulation announcing a Commission policy that it would not issue a television license to an applicant, even though no application was before the Commission.

The structure of the Voting Rights Act, and the Act's specific provision of different modes of challenge, does not in any way diminish Texas's right to seek a declaratory judgment.[4] This Court has held that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review." *Abbott Laboratories*, 387 U.S. at 141 (citing *Rusk v. Cort*, 369 U.S. 367, 379-80 (1962)). Thus, in *Abbott*

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[4] The lower court was hesitant to address Texas's declaratory judgment action because it did "not fall clearly into" any of the three categories for actions previously recognized under Section 5. Pet. App. at 4a. Those three categories, recognized by this Court in *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), provide that: a state may bring an action for judicial preclearance, seeking a declaration that a new rule was not enacted for a discriminatory purpose; an individual may bring a private enforcement action for declaratory judgment and injunctive relief to block a change that has not been precleared; and the Attorney General may bring an enforcement action. *Id.* at 554-57, 561.

Laboratories the Court also rejected the Government's argument that Congress's authorization of specific procedures for review thereby excluded other types of pre-enforcement challenge. *Id.; see also Allen*, 393 U.S. at 554-57 (finding private parties could bring declaratory judgment action for enforcement of Voting Rights Act although Act did not explicitly grant or deny right to sue for state's failure to comply). Thus, the fact that Congress has provided other means to obtain judicial determinations concerning changes which arguably implicate the Voting Rights Act should not have deterred the lower court from addressing Texas's complaint.

The lower court held, and DoJ contends, that Texas's claims are not fit for judicial decision because any decision would have to be based upon hypothetical facts which may not come into being. However, this case could have been resolved by the lower court without waiting for Texas to exercise its authority to place a master or management team.

The authority of Texas to make such a placement, and the limitations upon a master or management team appointed under the statute, are specifically set forth in the statute. TEX. EDUC. CODE § 39.131(e). Under the statute, the elected board of trustees is not displaced while a master or management team is in place. The statute directs the master or management team to address a specific deficiency in the school district which led to the appointment; meanwhile, the school board continues to exercise its authority in other matters.

The statute further requires that the Commissioner of Education evaluate the continued need for the master or management plan every ninety days, and requires removal

of the master or management team unless the "continued appointment is necessary for effective governance of the district or delivery of instructional services." *Id.* Also, the statute limits the powers of the master or management team, by preventing them from taking any action concerning a district election, changing the number or method of selecting the board of trustees, setting a tax rate for the district, or adopting a budget providing for spending a different amount from that previously adopted by the board of trustees. TEX. EDUC. CODE §§ 39.131(e)(3)-(6). Given these limited powers of the master or management team, it is clear that the school district board of trustees will retain authority to perform many essential functions even while an appointment is in place.

It was therefore unnecessary for the lower court to await any factual determinations in order to decide whether the appointment of a master or management team constituted a change affecting voting within the meaning of the Voting Rights Act. The lower court could have, and should have, rendered a declaratory judgment based upon a legal assessment that Sections 39.131(a)(7) and (8) do not create changes affecting voting subject to the Voting Rights Act.

B. The Lower Court Improperly Minimized the Hardship to the State of Texas Caused by Denying Judicial Consideration

In ruling that Texas's claim failed the second prong of *Abbott Laboratories*, the lower court failed to fully consider the hardship to the State of Texas of denying judicial consideration of its complaint. In *Abbott Laboratories*, the Court characterized the hardship prong as asking whether "the legal issue presented is fit for judicial resolution, and

. . . requires an immediate and significant change in [Texas's] conduct of [its] affairs with serious penalties attached to noncompliance." *Id.* at 153. The lower court dismissed Texas's argument as "vague", without fully considering the difficulties Texas will encounter if it desires to impose the statutory sanctions. Pet. App. at 9a.

In Texas, as in many states, the responsibility for educating Texas school children is the joint responsibility of the State and the local school districts.[5] The Texas state legislature has set educational goals which all school districts must meet in order to ensure that all school children are provided with a comparable, quality education. In order to ensure that local school districts comply with State standards, the State must be able to hold the school districts accountable for meeting the standards. Thus, the legislature amended the Texas Education Code in 1995 to provide the option of appointing a master or management team on a temporary basis to ensure such accountability.[6]

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[5] The Texas Constitution provides that "[a] general diffusion of knowledge [is] essential to the preservation of the liberties and rights of the people" and it is "the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." TEX. CONST., Art. VII, § 1.

[6] Chapter 39 of the Texas Education Code authorizes the imposition of sanctions on a school district in several circumstances, including: lowered or unimproved accreditation ratings where an annual review of academic performance reveals unacceptable performance by a subgroup for which data is disaggregated as to race, ethnicity, sex, or socioeconomic status under § 39.051(b); where an investigation discloses violations of federal law or regulations; or where an investigation discloses a violation of the state's accountability system, accounting and financial practices, excessive alternate placements, or violations of civil rights or (continued...)

The lower court's dismissal of the action puts the State of Texas in the untenable position of not knowing whether its important educational reforms will be deemed legal, and requiring that the State mire itself in time-consuming litigation or bureaucratic review any time it desires to exercise its authority under its education statute.[7] This quandary is particularly egregious because the reforms at issue, *viz.*, the ability to appoint a master or management team, are intended to allow Texas to act promptly, but on a temporary basis, in order to address the failure of local school districts to comply with state education standards or federal law.

The result dictated by the lower court effectively transforms the Voting Rights Act into a mandate that the federal government intervene into matters of state administration unrelated to voting. This result constitutes an enormous federal intrusion on the state's traditional autonomy in providing educational services to its citizens. This Court has already held that the Voting Rights Act does not compel such an extreme result.

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[6](...continued)
other federal requirements. TEX. EDUC. CODE §§ 39.073; 39.074; 39.075. Thus, the lower court's ruling creates the ironic result that the Voting Rights Act may be used to hamstring efforts to improve educational opportunities for racial and ethnic minorities.

[7] Indeed, in the lower court Texas cited as an example a situation in which one school district sought to preclear placement of a management team on March 10, 1996. Sixty days later, DoJ sought additional information, and DoJ finally precleared the placement on June 6, 1996, on an "expedited" basis. In the interim, both the Internal Revenue Service and the Federal Bureau of Investigation had raided the district's offices to investigate financial wrongdoing. Texas Mot. for S.J. at 23, n. 13 (Sept. 19, 1996).

In *Presley v. Etowah County Commissioners*, 502 U.S. 491 (1992), this Court stated:

> By requiring preclearance of changes with respect to voting, Congress did not mean to subject routine matters of governance to federal supervision. Were the rule otherwise, neither state nor local governments could exercise power in a responsible manner within a federal system.
>
> * * *
>
> If federalism is to operate as a practical system of governance and not a mere poetic ideal, the States must be allowed both predictability and efficiency in structuring their governments. Constant minor adjustments in the allocation of power among state and local officials serve this elemental purpose.
>
> Covered changes must bear a direct relation to voting itself.

Id. at 507-510.

Moreover, it cannot be said that Texas's hardship is remedied by the opportunity to conduct "expedited" litigation in the future. The power of the federal government to force Texas to seek approval for its every use of the master or management team appointment power violates principles of federalism and weakens Texas's ability to ensure quality education. In *Allen*, while addressing the need for a three-judge panel to hear Section 5 disputes, the Court stated, "The clash [created by the Voting Rights Act] between federal and state power and the potential disruption

to state government are apparent. . . . Other provisions of the Act indicate that Congress was well aware of the extraordinary effect the Act might have on federal-state relationships and the orderly operation of state government." *Allen*, 393 U.S. at 562-63.

States cannot efficiently conduct the vital function of educating school children when any attempt at enforcing accountability must be first approved by the federal government or a court. Texas framed for the lower court a pure legal issue arguing that it did not require preclearance in order to implement its reforms. The lower court could have and should have adjudicated that claim.

II. THE APPOINTMENT OF A MASTER OR MANAGEMENT TEAM PURSUANT TO TEX. EDUC. CODE § 39.131(a)(7),(8) WOULD NOT CONSTITUTE A CHANGE IMPLICATING SECTION 5 OF THE FEDERAL VOTING RIGHTS ACT

Essential to DoJ's argument, and the lower court's decision, is the presumption that the appointment of a master or management team under Texas law might constitute a change affecting voting rights within the meaning of the Voting Rights Act. Under that argument, because such an appointment may or may not constitute such a change, the lower court held that it could not rule on Texas's declaratory judgment action in the absence of a fact-specific exercise of the appointment authority. However, the presumption that such an appointment might implicate the Voting Rights Act is erroneous, and therefore the district court should have ruled on Texas's complaint because it presented a pure question of law.

The Voting Rights Act was intended to "implement[] Congress' firm intention to rid the country of racial discrimination in voting." *Allen*, 393 U.S. at 548. Under the Act, any covered state must obtain preclearance of legislation that is a "voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 . . . ." 42 U.S.C. § 1973c. The Act further provides that "voting" shall include "all action necessary to make a vote effective in any . . . election, including, but not limited to, registration, listing pursuant to this Act, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast . . . ." 42 U.S.C. § 1973*l*(c)(1).

Section 5 of the Act was designed to address the concern that States would enact new and slightly different voting requirements for citizens after the Act suspended various practices, such as literacy requirements and other voting qualifications. *Allen*, 393 U.S. at 548. Thus, in that case, the Court held that Section 5 applied to state rules relating to qualifications of candidates and to state decisions as to which officers shall be elective. *Id.* at 564-65. However, in recognition of the countervailing interests of the states, the Act is clear that states need not seek preclearance if the legislation in question does not affect voting. As this Court stated in *Presley*, " . . . § 5 is unambiguous with respect to the question whether it covers changes other than changes in rules governing voting: It does not." *Presley*, 502 U.S. 509.

In this respect, DoJ and the lower court ignored this Court's seminal decision in *Presley*. The issue presented in

that case was whether the permanent delegation of authority from an elected to an appointed official constituted a change respecting voting. In that case, a group of County Commissioners, without preclearance, passed a resolution altering a prior practice by which each elected county commissioner had full authority to determine how to spend funds allocated to his or her road district. *Id.* at 495-99. The commissioners passed the resolution shortly after a black commissioner was elected from a district established under a consent decree.

This Court held that: "[c]hanges which affect only the distribution of power among officials are not subject to § 5 because such changes have no direct relation to, or impact on, voting." *Id.* at 506. The Court explained, "[o]ur cases since *Allen* reveal a consistent requirement that changes subject to § 5 pertain only to voting." *Id.* at 502. The Court described the limited areas in which it had found the Voting Rights Act to apply, which included: changes in the manner of voting; changes in candidacy requirements and qualifications; changes in the composition of the electorate that may vote for candidates for a given office; and the creation or abolition of an elective office. *Id.* at 502-03.

Notably, the Court in *Presley* rejected the contention of a prior administration's Department of Justice, embodied in an administrative construction of Section 5 of the Act, that the Voting Rights Act applied. *Id.* at 508-09. The change in the authority of elected officials did not constitute a change affecting voting because there had been no change in elective office, and it was "a routine part of governmental administration for appointive positions to be created or eliminated and for their powers to be altered." *Id.* at 507.

Explaining in terms directly applicable to the United States' argument in this case, the Court stated:

> A citizen casting a ballot for a commissioner today votes for an individual with less authority than before the resolution, and so, it is said, the value of the vote has been diminished.
>
> Were we to accept appellants' proffered reading of § 5, we would work an unconstrained expansion of its coverage. Innumerable state and local enactments having nothing to do with voting affect the power of elected officials. When a state or local body adopts a new governmental program or modifies an existing one it will often be the case that it changes the powers of elected officials. So too, when a state or local body alters its internal operating procedures . . . it "implicate[s] an elected official's *decisionmaking authority*." (Citation omitted; emphasis in original.)
>
> * * *
>
> Under the view advanced by appellants and the United States, every time a state legislature acts to diminish or increase the power of local officials, preclearance would be required. . . . The all but limitless minor changes in the allocation of power among officials and the constant adjustments required for the efficient governance of every covered State illustrate the necessity for us to formulate workable rules to confine the coverage of § 5 to its legitimate sphere: voting.

Id. at 504-06.

As was the case in *Presley*, the voters of Texas will still elect members of the school districts' boards of trustees, and the boards will continue to exist and retain their powers. This case thus presents an even less compelling case than *Presley* for a finding that preclearance is required: in *Presley*, authority was *permanently* delegated from an elected to an appointed official; in this instance, if the Texas Commissioner of Education appoints a master or management team, the appointed entity's authority is strictly limited by the statute and is also limited in time to the duration of the deficiencies which gave rise to the appointment.

The Court's decisions in *McCain v. Lybrand*, 465 U.S. 236 (1984), and *Lockhart v. United States*, 460 U.S. 125 (1983), both of which predate *Presley*, do not dictate a contrary result.[8] In *McCain*, the Court addressed a complaint filed by black voters concerning a change whereby appointed officials were replaced by elected officials. The Court's ruling focused on whether the Attorney General's lack of objection to a later amendment effectively ratified a prior change in the relevant statute; the Court held that it did not. *McCain*, 465 U.S. at 257-58. The Court did not need to reach the question whether the changes required preclearance under Section 5, because the parties had entered a stipulation agreeing that Section 5

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[8] The Court's decision in *Bunton v. Patterson*, 393 U.S. 544 (1967), is also distinguishable from this case. As this Court described the case in *Presley*, *Bunton* did not involve a change in relative authority of government officials, but rather a permanent change from an elective office to an appointive one. *Presley*, 502 U.S. at 505-07; *Bunton*, 393 U.S. at 550-51. After the change, citizens were prohibited from electing an officer formerly subject to the approval of the voters.

applied, apparently because the change resulted in an at-large residency requirement voting scheme. *Id.* at 250, n. 17. An additional question concerning yet a third change arguably implicating Section 5 was likewise not addressed by the Court. *Id.* at 258, n. 30.

In *City of Lockhart*, the Court held that a City's new election plan did not have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority group, and the Court reversed a district court finding to the contrary. *City of Lockhart*, 460 U.S. at 136. In reaching this result, the Court stated that the City's extensive new election plan for the election of city officials was subject to preclearance under Section 5. Again, in acknowledgment of the fact that the election plan created significant change in the manner of election of city officials, the City conceded that Section 5 applied to its electoral changes, the addition of two seats to the governing body, and the introduction of staggered terms of office. *Id.* at 131. However, the City contended that several other aspects of its procedures were severable and were not covered by Section 5. The Court held that the City's entire plan was subject to preclearance because individual elements of the plan could not be viewed in isolation, but could only be evaluated in the context of the other elements of the election plan which the City had acknowledged as covered by Section 5. *Id.* at 131-32.

Thus, neither case supports the argument that Texas's power to temporarily appoint a master or management team for a school district requires Section 5 preclearance. To the contrary, *Presley* makes clear that Texas's education reforms do not constitute changes in voting within the meaning of Section 5.

III. TEXAS'S CLAIM THAT THE VOTING RIGHTS ACT DOES NOT APPLY TO STATUTES AUTHORIZED BY FEDERAL LAW IS RIPE FOR REVIEW

In the lower court, Texas argued that its educational reforms were, for purposes of analysis under the Voting Rights Act, authorized or even mandated by federal law. Texas contended that federal law, including the federal Improving America's Schools Act, 20 U.S.C. § 6301, *et seq.*, and the Goals 2000: Educating America Act ("Goals 2000"), 20 U.S.C. § 5801, *et seq.*, authorized Texas to use its own education accountability program and to take action against substandard school districts.

For example, Texas argued that the Improving America's Schools Act required it to take action against local educational agencies that fail to make adequate progress toward meeting student performance standards, and those actions included the appointment of a receiver or trustee to administer the affairs of the local educational agency in place of the superintendent and school board. 20 U.S.C. § 6317(d)(6)(B)(i)(IV). Texas argued that its reforms were therefore tantamount to acts taken pursuant to federal law, which did not require preclearance under the Voting Rights Act because that Act applies only to affected states and subdivisions.[9]

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[9] Section 1973 of the Voting Rights Act provides, in pertinent part:

> [n]o voting qualification or prerequisite to voting or standard, (continued...)

Texas's claim presents a pure legal issue which was certainly ripe for review. No factual development or case-specific application of the appointment power was necessary for the lower court to resolve this issue. Simply stated, Texas's claim asked the court to resolve whether reforms it had enacted pursuant to federal education statutes were within the ambit of the Voting Rights Act, or whether, as a matter of law, they were exempt from Voting Rights Act scrutiny. The answer to that question could not possibly depend on the precise amount of authority granted the master or management team, the duration of the appointment, or the specific actions taken by the appointed entities. Regardless of those variables, Texas presented a question of law contending that the reforms would not be covered by the Voting Rights Act in all cases.

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[9](...continued)

> practice, or procedure shall be *imposed or applied by any State or political subdivision* in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . .

42 U.S.C. § 1973 (emphasis added).

CONCLUSION

Amici curiae respectfully urge that the judgment of the U.S. District Court for the District of Columbia be reversed.

Respectfully submitted,

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(8)

No. 97-29

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

STATE OF TEXAS,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLEE

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BRIEF FOR *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF APPELLEE

INTEREST OF AMICI CURIAE[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that commitment, the ACLU has been active in defending the right of racial and other minorities to participate in the electoral process. Specifically, the ACLU has provided legal representation to minorities in numerous jurisdictions throughout the country, and has frequently participated in voting rights cases before this Court, both as direct counsel, *see, e.g., Abrams v. Johnson*, 117 S. Ct. 1925 (1997); *Holder v. Hall*, 114 S. Ct. 2581 (1994); *McCain v. Lybrand*, 465 U.S. 236 (1984); and *Rogers v. Lodge*, 458 U.S. 613 (1982), and as *amicus curiae*, *see, e.g., Reno v. Bossier Parish School Board*, 117 S. Ct. 1491 (1997); and *United States v. Hays*, 115 S. Ct. 2431 (1995).

The NAACP Legal Defense and Educational Fund, Inc., is a nonprofit corporation chartered by the

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[1]Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. No counsel for any party had any role in authoring this brief, and no person or entity other than the named *amici curiae* or their counsel have made any monetary contribution to the preparation or submission of this brief.

Appellate Division of the New York Supreme Court as a legal aid society. The Fund was established for the purpose of assisting African Americans in securing their constitutional and civil rights and this Court has recognized the Fund's "reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963). The Fund has participated in many of the significant voting rights cases before this Court. *See, e.g., Bush v. Vera*, 116 S. Ct. 1941 (1996); *Shaw v. Hunt*, 116 S. Ct. 1894 (1996); *Chisom v. Roemer*, 501 U.S. 380 (1991); *Houston Lawyers' Association v. Attorney General of Texas*, 501 U.S. 419 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977); *Allen v. State Board of Elections*, 393 U.S. 544 (1969).

SUMMARY OF ARGUMENT

In this case, Texas seeks to invent a new cause of action under the Voting Rights Act. Its proposal -- to allow jurisdictions covered under section 5 of the Act to obtain a declaratory judgment that a particular change in state law does not affect "voting" -- defies the careful architecture of the Voting Rights Act as a whole.

With respect to covered jurisdictions, Congress created two, and only two, causes of action. First, states or subdivisions that are covered jurisdictions may seek preclearance of changes in their electoral laws under section 5 of the Act. Second, covered jurisdictions may seek complete relief from the

obligation to seek preclearance by filing a "bailout" lawsuit under section 4(a) of the Act. Congress has required both types of lawsuits to be brought in the United States District Court for the District of Columbia ("the D.D.C.").

With respect to contested questions of coverage, Congress did not provide jurisdictions with the opportunity Texas demands here: essentially the right to have a federal court issue an advisory opinion confirming Texas's interpretation of the Voting Rights Act. Rather, Congress expected that section 5 would be self-executing, and that federal courts would intervene in the state's everyday implementation of its laws only if and when citizens disagreed with the state's interpretation of its duties under section 5.[2] The function of so-called "coverage lawsuits" is to determine whether a jurisdiction that contends that a particular change does not affect voting must nonetheless seek preclearance. These lawsuits are to be brought, not in the D.D.C., but in local federal district courts or state courts. Texas cannot circumvent this carefully designed scheme by creating a kind of hybrid lawsuit.

The potential doctrinal and practical difficulties with Texas's proposal are illustrated by this case. First, as the district court recognized in dismissing the case on ripeness grounds, determining whether a particular enactment represents a change with respect to voting may require a searching practical evaluation of political

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[2]Congress also gave the United States Attorney General the right to institute an action for "preventive relief." 42 U.S.C. § 1973j(d) (1994).

reality within a covered jurisdiction. In particular, this Court's experience with laws regulating educational matters shows that these laws can have racially discriminatory effects on voting or candidacy or may mask racially discriminatory purposes to bring about such effects. Given Congress's determination that racial discrimination in voting was often both a cause and an effect of racial discrimination within the educational system, Texas's "federalism" argument rings especially hollow. Second, given the overall statutory scheme, even if Texas received the declaratory judgment it seeks, this would not preclude either a private section 5 coverage suit in a local district court or other litigation challenging a given implementation of Texas Educ. Code Ann. § 39.131(a)(7) or (a)(8) (West 1996). Finally, permitting jurisdictions in Texas's position to bring declaratory judgment actions poses a significant danger of substantially increasing the burdens on both the D.D.C. and this Court.

ARGUMENT

I. TEXAS'S PROPOSED CAUSE OF ACTION UNDERCUTS THE STRUCTURE OF THE VOTING RIGHTS ACT

As this Court reiterated last Term in *City of Boerne v. Flores*, 117 S. Ct. 2157 (1997), the preclearance regime established by sections 4 and 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973b, 1973c (1994), represents "'Congress' considered determination,'" 117 S. Ct. at 2167 (quoting *City of Rome v. United States*, 446 U.S. 156, 182 (1980)), about how to combat "'the

blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century'" 117 S. Ct. at 2167 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)). Into this intricate regulatory system, in which Congress has successfully balanced the national constitutional commitment to eradicating discrimination in voting with states' interests in self-government, Texas seeks to inject a completely unprecedented cause of action.

In 1965 -- and again when it amended and extended the Act in 1970, 1975, and 1982 -- Congress established the following regime. Section 4 employs an objective formula to identify jurisdictions with a history of depressed voter turnout and the use of constitutionally suspect "tests or devices." Section 5 forbids such "covered jurisdictions" from administering changes in any "standard, practice, or procedure with respect to voting" unless and until they receive federal approval.

Congress provided two mechanisms for obtaining this approval or "preclearance." First, a jurisdiction may seek a declaratory judgment from the D.D.C. Second, a jurisdiction may obtain "administrative" preclearance by submitting its proposed changes to the Attorney General of the United States. The Attorney General is to apply the same substantive standards that the district court would have used; if he or she does not interpose an objection within sixty days, the change may be implemented.

Congress recognized that the preclearance regime marked an "extraordinary departure" from the usual

relationship between the federal government and the states. *Presley v. Etowah County Commission*, 502 U.S. 491, 500 (1992). It responded to this insight in three ways. First, Congress limited preclearance to "regions of the country where voting discrimination had been most flagrant" and reached only "a discrete class of state laws, i.e., state voting laws." *Flores*, 117 S. Ct. at 2170; *see, e.g., Presley*, 502 U.S. at 510 ("Congress meant . . . what it said when it made § 5 applicable to changes 'with respect to voting' rather than, say, changes 'with respect to governance.'"). Second, the entire preclearance regime is only temporary; absent renewed congressional action, it will expire in 2007. *See* 42 U.S.C. § 1973b(a)(8). Finally, Congress provided states and jurisdictions with an opportunity to seek a declaratory judgment relieving them altogether of the obligation to comply with section 5. The substantive and procedural requirements for this so-called "bailout action" are laid out in section 4(a)(1) of the Act. Such declaratory judgments can be granted only by the D.D.C.; they are to be heard by three-judge courts with direct appeal to this Court; and there are detailed provisions for the retention of jurisdiction and for the court's ability to reopen the case in the event of subsequent discrimination. Bailout is available only if the jurisdiction can show complete compliance during the preceding ten years with constitutional and statutory protections of the right to vote as well as constructive efforts to provide equal access to all aspects of the electoral process. *See* 42 U.S.C. § 1973b(a)(1). *See also City of Fairfax v. Reno*, No. 97-2212-JR (D.D.C. Oct. 21, 1997) (three-judge court) (granting a bailout to Fairfax, Virginia).

What Congress did not do was create a declaratory judgment action for a determination of "non-coverage." Congress expressly provided covered jurisdictions with two, and only two, forms of declaratory judgment action: one, under section 5 of the Act, provides for the approval of particular changes with respect to voting; the other, under section 4, relieves them of the obligation to comply with the preclearance requirement altogether. Congress did not, by contrast, make available the kind of declaratory judgment Texas seeks in this proceeding: namely, a declaration of non-coverage of a particular type of government decision. The text of the statute expressly provides that covered jurisdictions "may institute an action" whenever they "enact or seek to administer" any new "*voting* qualification or prerequisite to *voting*, or standard, practice or procedure with respect to *voting*," 42 U.S.C. § 1973c (emphasis added), not that they may institute an action whenever they enact or seek to administer any new law regardless of its subject.

What Texas is trying to accomplish here is the creation of a kind of hybrid cause of action in which it gets a partial bailout: a judicial declaration that it does not have to comply with section 5 with regard to a subset of decisions. But section 4 was deliberately written to permit bailout only by jurisdictions that have complied fully with constitutional and statutory protections of the right to vote for ten years, and Texas is undeniably not such a jurisdiction.

Nor is the absence of any congressional authorization for the kind of lawsuit Texas has tried to bring at all surprising. Covered jurisdictions enact, and

seek to administer, roughly 17,000 electoral changes a year. *See Clark v. Roemer*, 500 U.S. 646, 658 (1991). Given the likely ratio of new laws and procedures "with respect to voting" to new laws and procedures with respect to everything else state and local governments do, there may well be *millions* of changes unrelated to voting each year. Congress had no intention, under the Voting Rights Act, of interfering with the states' implementation of these other laws. Nor would Congress have intended to saddle the D.D.C. with the responsibility of confirming states' correct legal conclusions that particular enactments did not require preclearance. Congress and this Court expected that scrupulous "self-monitoring," *Clark*, 500 U.S. at 659, would largely determine which changes were related to voting and required preclearance. And the Attorney General has expressly provided for the possibility that a state might err on the side of caution and submit for preclearance a change that is not covered by the Act. The regulations governing administrative preclearance provide that the Attorney General will notify a jurisdiction "as promptly as possible and no later than the 60th day following receipt" of a submission if the submission is "inappropriate" because the changes "do not affect voting." 28 C.F.R. § 51.35 (1997).

Of course, although most enactments fall clearly inside or outside the scope of section 5, there are some that lie close to the line. Thus, it is possible that a state will reasonably conclude in good faith that a particular statute does not require preclearance and that either the Attorney General or individual citizens within the jurisdiction will disagree. The overall architecture of section 5 shows, however, that Congress has chosen a

very different mechanism for resolving the question Texas seeks to have answered. As this Court explained in *Allen v. State Board of Elections*, 393 U.S. 544, 554-57 (1969), section 5 confers upon private citizens (as well as the Attorney General) the right to enforce the state's preclearance obligation. These "coverage" actions are brought in local federal district courts (or state courts, *see Hathorn v. Lovorn*, 457 U.S. 255, 269 (1982)), rather than in the D.D.C. *See Allen*, 393 U.S. at 558-60. The Court's determination that coverage cases be tried locally was quite deliberate; as the Court recognized, individual litigants might lack the resources to litigate their claim that a challenged act affected voting if they were forced to travel to Washington. *See id.* at 559-60.

Texas's lawsuit turns section 5's commitment "to shift the advantage of time and inertia from the perpetrators of the evil to its victims," *South Carolina v. Katzenbach*, 383 U.S. at 328, on its head. Under Texas's theory, it can force all individuals who can foresee any set of circumstances under which the appointment of a master or a management team might abridge their voting rights to litigate now, in a far-off forum, without the jurisdiction-specific facts that might show the court how a particular implementation of a generally innocuous statute posed a serious threat of racial discrimination in the election process. For reasons we explain in the next section, this theory is unavailing.

II. SECTION 5 CONTEMPLATES THAT DECISIONS ABOUT WHETHER PRECLEARANCE IS REQUIRED WILL BE MADE IN THE CONTEXT OF CONCRETE CASES

As the previous section showed, Texas seeks to dismantle the well-developed and longstanding structure of section 5. The district court and the United States have explained why Texas's claim is not ripe. Rather than repeat those arguments, this section focuses on two other deficiencies in Texas's theory that also stem from the fact that the operation of §§ 39.191(a)(7) and (a)(8) has not yet "sufficiently crystallized," *Better Government Association v. Department of State*, 780 F.2d 86, 92 (D.C. Cir. 1986), to be the subject of an orthodox section 5 coverage or preclearance proceeding. First, the lack of a concrete context may obscure the potential for racial discrimination in voting which would become evident in the course of particular applications of §§ 39.191(a)(7) and (a)(8). Second, Texas's attempt to shoe-horn this case into the D.D.C. -- since there is clearly no provision in the Act under which the state can sue in a local district court -- means that any judgment would be little more than an advisory opinion; any individual whose right to vote is affected by a particular implementation of the statute would remain free to bring a traditional section 5 coverage lawsuit seeking injunctive relief. These factors further confirm the imprudence of engrafting onto the Act a new cause of action for "non-coverage."

Texas's proposed cause of action rests on the implicit assumption that state educational policy is unlikely to involve discrimination in voting. That

implication is belied by two of this Court's most significant section 5 coverage cases. Both *Allen v. State Board of Elections* and *Dougherty County Board of Education v. White,* 439 U.S. 32 (1978), involved decisions ostensibly about educational policy that were in fact attempts to suppress minority voting strength or had the potential for doing so. *Bunton v. Patterson*, one of the four cases decided together in *Allen*, involved Mississippi's decision to require eleven counties to appoint their county superintendent of education. *See* 393 U.S. at 551. The most thorough study of voting rights in Mississippi during the 1960s shows that these counties were singled out by the state precisely because of a threat that black voters within them might soon form a majority of the electorate and thereby elect black school superintendents. *See* Frank R. Parker, Jr., Black Votes Count: Political Empowerment in Mississippi After 1965, at 56-58 (1990). Similarly, *Dougherty County* involved a "personnel rule" passed by the County Board of Education requiring candidates for political office to take unpaid leaves of absence during the campaign. As the Court explained:

> [T]he circumstances surrounding its adoption and its effect on the political process are sufficiently suggestive of the potential for discrimination to demonstrate the need for preclearance. Appellee [who was an administrator in the Dougherty County schools] was the first Negro in recent years to seek election to the General Assembly from Dougherty County, an area with a long history of racial discrimination in voting. Less than a month after appellee announced his candidacy,

> the Board adopted Rule 58, concededly without any prior experience of absenteeism among employees seeking office.

Dougherty County, 439 U.S. at 42.

In light of *Allen* and *Dougherty County*, it is certainly possible to imagine circumstances under which a particular decision to appoint a master or a management team or to delegate certain powers to them stems from the desire to reassert white control over a school board whose members were elected primarily by minority voters. Suppose, for example, that the Commissioner delegates so much power to the master or management teams that the delegation "rise[s] to the level of a de facto replacement of an elective office with an appointive one, within the rule of *Bunton v. Patterson*." *Presley*, 502 U.S. at 508. That surely would affect voting. The very fact that Texas thought it necessary to provide that masters and management teams "may not take any action concerning a district election" and "may not change the number of or method of electing the board of trustees," Tex. Educ. Code Ann. §§ 39.191(e)(3), (e)(4), suggests that the state was well aware that masters and management teams *might* trench on voting rights if they were not carefully regulated. Or suppose, more invidiously, that a future Commissioner of Education decides which districts to sanction, or the relative severity of the sanction, by looking at whether a majority of the members of the board are racial or language minorities. If minority voters are more likely than other similarly situated voters to have their elected boards subjected to

outside intervention, this too poses the threat of abridging minority voting rights.

If Texas is correct that under no circumstances could the Commissioner of Education's exercise of power under §§ 39.131(a)(7) and (a)(8) involve changes affecting voting, then it should simply exercise those powers. If individual citizens or the United States disagree and bring a coverage action, the action will be dismissed. Only if Texas is wrong, and a particular exercise of power under §§ 39.131(a)(7) or (a)(8) actually *does* affect voting -- and there is good reason for thinking Texas might be mistaken[3] -- will the State be enjoined from implementing that change, and then only until it can convince the Attorney General or the D.D.C. that the change has neither a discriminatory purpose nor a discriminatory effect. Only if Texas fails to demonstrate that its use of its power to appoint masters or management teams is not in fact racially discriminatory will the state be permanently barred from implementing a change.

Stripped of its federalism rhetoric, Texas's claim is that it should have the right to trade off its minority citizens' federally protected voting rights in the service of the state Commissioner of Education's judgments about good educational policy. Given the importance

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[3]*See Casias v. Moses*, No. SA-95-CA-0221 (W.D. Tex. May 11, 1995) (granting a preliminary injunction under section 5 against a predecessor to § 39.131(a)(8), on the grounds that the plaintiffs were likely to prevail in showing that the appointment of a management team affected voting).

in the constitutional hierarchy of the right to vote, *see, e.g., Kramer v. Union Free School District*, 395 U.S. 621 (1969), Congress clearly has the power to require Texas to pursue its educational objectives only through policies that respect the equal political rights of its minority citizens.

Texas correctly recognized that declaratory judgment actions brought by covered jurisdictions must be brought in the D.D.C. But it fails to see the practical implications of this requirement for the action it seeks to bring in this case. In a conventional section 5 case, only the D.D.C. *can* decide the contested issue. If the D.D.C. grants a declaratory judgment, then section 5 drops out of the picture entirely; the jurisdiction is free to administer the new practice or procedure. If the D.D.C. denies a declaratory judgment, then it will issue a permanent injunction against the jurisdiction. Similarly, in a conventional bailout declaratory judgment, either the D.D.C. grants or denies the requested relief.

By contrast, if the D.D.C. were to entertain Texas's "non-coverage" lawsuit, any declaratory judgment it might grant would be binding only upon the parties. *See Hathorn v. Lavorn*, 457 U.S. at 268 n.23 (a plaintiff "is not bound by the resolution of § 5 issues in cases to which he was not a party"). Texas cannot make individual voters parties to a section 5 proceeding in the D.D.C.; for one thing, the D.D.C. likely lacks personal jurisdiction over them. Thus, any judgment the D.D.C. might grant, even if it might preclude the United States Attorney General from bringing a section 5 enforcement action in local district court, would not

preclude individual voters from bringing such an action. For this reason, it is entirely possible that a local district court, particularly based upon a different trial record, would still enjoin a particular exercise of §§ 39.191(a)(7) or (a)(8).

Not only would this Court have mandatory appellate jurisdiction over the flood of "non-coverage" lawsuits, but it might have to hear some cases three times: once on an appeal from the D.D.C. over the non-coverage question; once on an appeal from the local district court on the more concretely presented coverage question; and perhaps again when the jurisdiction seeks judicial preclearance in the D.D.C. Further, Texas suggests no limitations upon the scope of the new declaratory judgment action it would engraft upon the Voting Rights Act. The state's theory that it is entitled to preempt local enforcement actions by suing first in the D.D.C. could by its logic, and unfettered by the explicit provisions of the Act, conceivably apply as well to potential suits under section 2 of the Act (which applies nationwide and reaches *all* voting practices and procedures, regardless of whether they are either changes or have been precleared) as it does to section 5 cases. Indeed, given the burgeoning and duplicative litigation that seems now to attend the decennial census, *see* Pamela S. Karlan, *The Rights To Vote: Some Pessimism About Formalism*, 71 Tex. L. Rev. 1705, 1726-29 (1993), the hope of a preclusive declaratory judgment might encourage many jurisdictions to file such lawsuits, which of course would be subject to direct appeal to this Court. Thus, Texas's proposal may be only the beginning of a wholly unnecessary jurisdictional morass.

CONCLUSION

Amici urge this Court to affirm the judgment of the United States District Court for the District of Columbia dismissing Texas's complaint.

Respectfully submitted,

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